EXTRACTS FROM TRANSCRIPT OF R

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1918.

No. 631.

SOUTH SIDE BELT RAILROAD COMPANY, PLAIN
BUILDING AND HERBERT W. SCHAEFER, RECEI
PLAINTIFFS IN ERROR,

vs.

PITTSBURGH CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE
PENNSYLVANIA.

RECEIVED THIRD AUGUST 30, 1918.

(22,302.)

(22,302.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 681.

WEST SIDE BELT RAILROAD COMPANY, FRANCIS H. SKELDING AND HENRY W. McMASTER, RECEIVERS, PLAINTIFFS IN ERROR,

vs.

PITTSBURGH CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1910.

(Record, page 231.)

In the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania.

No. 398, Fourth Term, 1907.

PITTSBURGH CONSTRUCTION COMPANY
vs.
WEST SIDE BELT RAILROAD COMPANY.

Statement of Claim.

And now, August 15th, 1907, comes the plaintiff, Pittsburgh Construction Company, by Reed, Smith, Shaw & Beal, its attorneys, and files the following statement of its cause of action against the defendant, the West Side Belt Railroad Company, viz.:

The defendant, the West Side Belt Railroad Company, is a corporation of Pennsylvania, and the plaintiff, the Pittsburgh Construction Company, is a corporation of West Virginia, duly incorporated under the laws thereof on May 14, 1901, and on June 15, 1901, duly registered in the office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, Pa., and established a known place of business and designated an authorized agent for the transaction of its business in said Commonwealth, and it has paid all taxes which would have accrued to the Commonwealth of Pennsylvania if it had so registered and established such place and designated such agent in accordance with the laws of Pennsylvania on May 14, 1901, and said plaintiff company has complied with all of the laws of Pennsylvania relative to doing business in said Commonwealth.

The said defendant is justly and legally indebted to the plaintiff for materials furnished and work and labor done and performed as hereinafter set out.

That prior to the 24th day of May, 1901, the said defendant company had caused to be surveyed an extension of its line of railroad about twelve miles in length, situate in Allegheny County, Pa., and to be prepared plans and specifications for the construction of said railroad.

For the purpose of procuring the construction of this line of railroad, and at the same time to subserve certain purposes of its own and of certain of its officers and directors, hereinafter more fully set out, the defendant caused to be prepared and executed a written agreement between one A. S. Petrie and said defendant, a copy of which is hereto attached, made a part hereof and marked "Exhibit A," by which agreement A. S. Petrie purported to agree to build said twelve miles of railroad for $400,000 in cash and $400,000 in bonds.

Plaintiff is informed and believes and avers that the facts respecting the execution of "Exhibit A" were substantially as follows:

Prior to the making of said contract, it was arranged between said defendant and John S. Scully and T. N. Barnsdall (the principal stockholders of said defendant, both of them directors, and the former the president thereof) that said Petrie should, and contemporaneously with the execution of said contract, he did, assign and transfer to said Scully and Barnsdall all of the consideration to be paid by the defendant and to be received by said Petrie under said contract. The cash therein mentioned was never actually paid by said defendant, but 8,000 shares of the par value of $400,000 of the capital stock of the defendant was issued and delivered to said Scully and Barnsdall, they agreeing with the defendant company to divide the stock so received pro rata among themselves and the other stockholders of said defendant. The $400,000 of bonds mentioned in said agreement were delivered to the treasurer of the defendant, and were by it, with the knowledge and consent and approval of said Scully and Barnsdall, used and dealt with at all times as its own property; all of which facts, however, were unknown to plaintiff until long after the making of said contract, Exhibit B.

Thereafter, on or about May 25, 1901, at the request of the said defendant, and acting under its directions, and in its behalf, the said Petrie entered into a contract with plaintiff, a copy of which is hereto attached, made a part hereof and marked "Exhibit B," and the defendant is the party therein mentioned and described as the Railroad Company.

At the same time and contemporaneously with the execution of said contract, "Exhibit B," the said defendant and Scully and Barnsdall signed the endorsement shown thereon, whereby they purported to become bound as sureties for the payments to be made thereunder.

The plaintiff further avers that it was never intended by said parties that said Petrie should build said line of railroad, or do any act or thing under either of said contracts other than to enable the issuance of said shares of stock; that said Petrie never did any work whatever in connection with or towards the construction of said line of railroad other than the signing of said contracts; that he was not a contractor, had no means or experience to enable him to perform such contract; that he was the brother-in-law of Scully, and the secretary of the defendant company, resigning that office on the day the contract with him was authorized by the company; that said Petrie has ceased to be a resident of the State of Pennsylvania, his present residence, as plaintiff is informed and believes, being in the State of California.

Upon the execution of said contract, "Exhibit B," the defendant adopted the same as its contract, assumed full control and charge of all matters connected with the construction of said line of railroad and pertaining to the performance of said contract, dealt with the plaintiff at all times as its contractor, and so continued to the full completion and acceptance by it of said line of railroad. From time to time during the progress of said work, payments were made in accordance with the terms of said contract, "Exhibit B," upon

monthly estimates, all of which payments were made by the defendant to the plaintiff, the amount thereof being $540,737.63.

The plaintiff proceeded with the construction of said line of railroad, and fully completed the construction thereof in all respects in accordance with the said contract, and to the satisfaction and acceptance of the chief engineer of said defendant, the same being completed and accepted by the defendant on June 11, 1903, and continuously since that time the defendant has been in the possession, enjoyment and operation thereof, and deriving a large revenue therefrom.

During the construction of said railroad, the said defendant, acting by its chief engineer from time to time, made changes in the location of the line of said railroad, and in the grade, plan, form and dimensions of the work to be done, with which, as required by the terms of the contract so to do, the plaintiff complied. The work done and the materials furnished by the plaintiff in the construction of said line of railroad, in so far as compensation therefor is provided by the classification contained in said contract, are shown on "Exhibit C" hereto attached and made a part hereof.

In the performance of said contract in accordance with the instructions of defendant and of its chief engineer, certain materials were required to be furnished and work and labor done and performed by the plaintiff, and by reason of the changes made and of the additional work which the plaintiff was required to perform, and the delays in the progress of the work due to defendant, the plaintiff was put to large expense and the cost of the performance of certain of the work embraced in the contract was greatly increased; the items of such extra work and materials, and of such additional expenses and cost being shown on "Exhibit D" hereto attached and made a part hereof. So far as practicable the said exhibit shows approximately the dates when such work was done, materials furnished or cost of expense incurred; as to the items for which dates are not given, the same were incurred between September 1, 1901, and June 11, 1903. The defendant has in its possession full information, data and knowledge respecting the nature, character and quantity of the work so done and materials furnished.

During the progress of the work embraced in said contract, James H. McRoberts, the party designated in said contract as the chief engineer of the Railroad Company, was by the said defendant appointed consulting engineer of said Railroad Company and at the same time, on September 11, 1902, H. T. Douglas was by said defendant appointed as chief engineer, and continued to act as such chief engineer from the date of his said appointment until long after the completion of said contract. Upon the completion of said work, and for several months thereafter, although the plaintiff frequently demanded of the said H. T. Douglas and of the said defendant, a final estimate of the work done and materials furnished to the said defendant, the said Douglas and said defendant failed and refused to deliver such final estimate. The plaintiff is informed and believes and avers, that in the month of September the said Douglas, acting then as chief engineer of the defendant, prepared

a proposed final estimate which showed a balance due from the said defendant to the plaintiff of $82,324.03; that upon the submission of such proposed final estimate to the officers of the defendant, the said officers set up a claim for damages against the plaintiff on account of non-fulfillment of said contract, amounting to more than the unpaid balance shown on such proposed final estimate; that the said officers presented the matter to counsel with a view of having the said H. T. Douglas as such chief engineer certify said amount of damages and deduct the same from said proposed final estimate, but being advised that the said Douglas had no authority to make such deduction from the estimate, they thereupon procured the said Douglas to resign as such chief engineer, and forthwith, upon the same day, September 16, 1903, appointed the said James H. McRoberts as chief engineer, who, on the following day, at the request of the said defendant, sent to the plaintiff a notice of a hearing before him on September 23, 1903, a copy of which notice is hereto attached, made a part hereof and marked "Exhibit E", and at the same time notified the said defendant also to appear before him. In pursuance thereof the plaintiff and the defendant appeared before the said McRoberts on September 21, 1903, and then and thereafter entered into an arbitration before him of all matters in dispute arising out of the performance of said contract, and especially of the matters embraced in "Exhibit D"; the hearings of the parties and their counsel, and the taking of testimony as to such claims, continuing before said arbitrator for about eighteen months, fifty-two meetings being held. Thereafter, on or about October 24, 1905, the said James H. McRoberts made and delivered his award, and did make and deliver his final estimate as such chief engineer, and by said award, and by said final estimate, he did find and certify that there was due to the plaintiff for materials furnished and for work and labor done and performed in the construction of said line of railroad, the sum of $973,488.61, less payments theretofore made by the defendant, amounting to $540,737.63, (a detailed statement of which is shown on "Exhibit D"), leaving the balance due $332,750.98. A copy of said award and of said final estimate are hereto attached, made a part hereof and marked respectively "Exhibit F" and "Exhibit G."

Said proposed final estimate, prepared by H. T. Douglas, chief engineer above mentioned, was never delivered to plaintiff, but on the contrary the existence thereof was concealed from the plaintiff by said defendant and said Douglas, and the plaintiff had no knowledge thereof until long after the making of said final award by said McRoberts as hereinbefore set out.

The plaintiff further shows that although due demand has been made of it so to do, the defendant has refused, and still refuses to pay unto the plaintiff any part of said moneys so due to the plaintiff.

Plaintiff has heretofore tendered to the defendant a release under seal of all claims and demands whatsoever growing in any manner out of said agreement, in due form, in accordance with the provisions of said contract, which the defendant has refused to receive, and plaintiff has at all times been, and is now ready and willing

to deliver said release to defendant upon payment of the amount due to plaintiff.

And the plaintiff further shows that the materials furnished and the work and labor done and performed by it were so done and performed for the said defendant at its special instance and request, and that the same were of the value hereinbfore set out, and that the prices shown and charged therefor in Exhibits "C" and "D" hereto attached were and are the fair and reasonable prices for the materials furnished and work and labor done.

Wherefore plaintiff brings this suit for the recovery of the moneys owing it by defendant as above set forth, with interest thereon from the time the same became due.

PITTSBURGH CONSTRUCTION COMPANY.
By REED, SMITH, SHAW & BEALE,
Its Attorneys.

ALLEGHENY COUNTY, *ss:*

Before me, a Notary Public in and for said County, personally appeared C. L. McKenzie, who, being duly sworn according to law, deposes and says that he is president of the Pittsburgh Construction Company, the plaintiff above named, and that the statements contained in the foregoing Statement of Claim are true and correct as he verily believes.

C. L. McKENZIE.

Sworn and subscribed before me this 15th day of August, A. D. 1907.

ROBERT T. ROSSELL,
Notary Public.

My commission expires February 27, 1909.

[SEAL.]

(Record, page 242.)

EXHIBIT A.

West Side Belt Railroad Company.

Contract.

Articles of Agreement Made and Concluded this 25th Day of April, A. D. 1901, By and Between A. S. Petrie, of Allegheny County and State of Pennsylvania, of the First Part, and The West Side Belt Railroad Company, of the Second Part; Witnesseth:

1. That for and in consideration of the covenants and payments hereinafter mentioned to be made and performed by the said party of the second part, the party of the first part hereby covenants and agrees to complete, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer, James H. McRoberts, of the said company, all the grading, masonry, bridging

and trestle work, as well as all ballasting and track-laying, required for the aforesaid railroad, a distance of about twelve (12) miles, as shown by the chief engineer's plans, profile and specifications of the line of the road of said Railroad Company, said work to be done agreeable to the directions and orders of the chief engineer, James H. McRoberts, of the West Side Belt Railroad Company, or his assistant, on or before the 1st day of January, A. D. 1902, and according to the plans and specifications, as follows, to wit:

* * * * * * *

For the whole work complete. Four hundred thousand dollars in cash, and the same amount in 5% bonds of the Company.

Such advance payment not to exceed eighty-five per cent of the value as thus estimated and certified. Such certificates may be based on either actual measurement or simple estimate, or both combined, as shall be approved by the said chief engineer, and, except as otherwise determined by the chief engineer, no amount so estimated and certified, nor any amount, shall in any wise be deemed payable nor shall the same be in any manner transferable or assignable either by the act of the contractor or by the operation of law, as a subsisting debt, or liability of the Railroad Company, until the final estimate shall have been made and become payable as hereinafter provided, nor (except at the option of the Company) until all amounts payable to laborers, sub-contractors, or material men shall have been fully paid, or the payment thereof secured to the satisfaction of the chief engineer. The portion of each amount certified (being not less than a sum equal to fifte-n per cent thereof) reserved by the Railroad Company shall be by it retained forever as compensation for or on account of any damages which may be certified by the chief engineer to have been by it sustained from any failure of the contractor to perform this contract, and the work thereunder as herein provided; but any part thereof not required as such compensation shall be payable and paid to the same person at the same time and upon the same conditions as the final payment under this contract hereinafter provided for.

And it is further provided that in the discretion of the chief engineer, or of the President of the Railroad Company, a larger proportionate part than fifteen per cent but not to exceed twenty-five per cent of each monthly certificate may be retained by the Railroad Company, as a protection against over-payment for work done as compared with that remaining to be done; and at all times it shall be wholly discretionary with the Railroad Company to make any payments on account of material delivered and not permanently applied to the work for which it may have been intended.

Every monthly estimate shall, for the time being, be conclusive upon both parties hereto, but being made merely as a basis for payment on account, though with a great desire and effort for accuracy, may be only approximately correct, and therefore, shall be subject to correction by the chief engineer, in any subsequent monthly estimate, or in the final estimate; and no such monthly estimate *or* or certificate for unfinished work shall be considered or taken as an acceptance of the work, or as a release of the said contractor from

responsibility therefor, nor as controlling the chief engineer in the final certificate, which alone shall operate as an acceptance of the work or as a release to the contractor.

When this agreement, in all its parts and in the manner herein provided, shall have been completely performed on the part of the contractor, and such performance shall have been accepted and so certified in writing by the said chief engineer, a final estimate of the quantity, character and value of the work done and materials furnished, according to the terms of this agreement, shall be made by the chief engineer, and thereupon and not otherwise sooner, except at its own election, the said Railroad Company shall, within thirty (30) days thereafter, pay to the said contractor, upon his giving a release under seal to the said Railroad Company from all claims or demands whatsoever growing in any manner out of this agreement, all sums of money so certified by the said chief engineer to be then remaining due and unpaid upon the work performed under this agreement, after first deducting therefrom any and all sums herein provided to be retained by the said Railroad Company; it being expressly understood that such final estimate and certificate of the chief engineer shall be conclusive upon the parties.

And it is further distinctly understood and agreed, the said contractor shall not assign or sublet the whole or any part of this agreement (or any work to be done thereunder) without having first obtained the consent, in writing, of the said Railroad Company thereto, through its chief engineer.

If at any time during the progress of the work, it shall appear to the chief engineer

(*a*) That the work does not progress with reasonable speed; or (*b*) that the force employed, the quantity or quality of tools, appliances, or workmen provided, or work done or materials furnished, are not respectively such as to insure the completion of the work within the agreed time, or not in accordance with the specifications hereto annexed; or (*c*) that the contractor has unreasonably failed to pay laborers and workmen or overseers for work performed under this agreement; or (*d*) that legal proceedings have been instituted by parties other than the Railroad Company against the contractor in such manner as to interfere with the prosecution of the work, or to subject the Railroad Company in making further payments under this contract to the peril of litigation or outside claims; or (*e*) that the contractor is failing in any matter of substance to observe and perform this contract,—then and in either of such events, such fact or condition, may be fully ascertained and declared by the chief engineer, over his signature, in a writing to be filed with the Railroad Company, and a copy thereof shall be served on the contractor, either in person or by mailing the same to him at the address by him last given to the Railroad Company, or by posting the same on the door of his office on or near the work, and at any time after the service as foresaid of such certificate by the chief engineer, the chief engineer may take the following course:

The chief engineer may, by a writing similarly served (of which a copy shall be filed with the Railroad Company) require the con-

tractor to at once supply such increase of force, appliances or tools and to cause to be made such improvement in the character of the work and materials as may be required, in the opinion of the chief engineer to make the same conform to the stipulations of this agreement and the specifications; and if on the expiration of ten days after such service of such writing, the contractor shall have failed to furnish to the Railroad Company evidence satisfactory to the chief engineer of the intention and ability of the contractor to furnish the desired improvements and remedy the specified deficiencies, the said Railroad Company may thereupon enter on and take possession of said work, or any part thereof with the tools, materials, plant, appliances, houses, machinery, or other appurtenances thereon, and hold the same as security for any or all damages or liabilities that may arise by reason of the non-fulfillment of this agreement within the time herein stipulated; and furthermore, may employ the said tools, materials, &c. as aforesaid, and such other means as the said Railroad Company may deem proper to complete the work, at the expense of the said contractor, and may deduct the cost of completing the entire work from any payments then due or thereafter falling due to the said contractor, and recover from him any and all deficiency.

And immediately upon, from and after the service as aforesaid of the last mentioned writing, all right of occupancy in or upon any lands or property of the Railroad Company, and all rights of the contractor, or of any person claiming under or through him, to any further prosecution of or interest in the work, shall cease and determine, and the Railroad Company may take possession of such lands or property and complete the work thereon in such manner and by such means as it may think best.

And it is further agreed and understood that if, at any time, the contractor shall refuse or neglect to prosecute the work with a force sufficient, in the judgment of the chief engineer, for its completion within the time specified, then, and in that case, the Railroad Company may proceed to employ such a number of workmen, laborers and overseers as, in the opinion of the chief engineer, may be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as the Railroad Company may find necessary or expedient, and may pay all persons so employed and charge all amounts so paid as so much money paid to the contractor under this contract.

And it is further agreed and understood that if the contractor shall not complete the said work within the time herein specified, and the said Railroad Company shall, notwithstanding such failure, permit the said contractor to proceed with or complete the said work, as if such time had not elapsed, such permission shall not be deemed a waiver in any respect, by the said Railroad Company, of any forfeiture or liability for damages or expenses thereby incurred arising from such non-completion of the said work within the time specified, but such forfeiture or liability shall still continue in full force against the said contractor as if such permission had not been granted. And it is further distinctly understood and agreed, that

time, whenever involved in this agreement, is of the essence of this agreement.

In all cases of non-payment by the said contractor of any sum or sums of money due to the laborers or other workmen for work performed under this agreement, the said Railroad Company is hereby authorized to pay such laborers or workmen the amounts due and owing them by the said contractor; and if any action or proceeding at law or in equity shall be instituted, by virtue of any law or statute now in force, or hereafter enacted, for labor and wages on said work, the said Railroad Company may pay all damages, wages, recoveries, costs, expenses and counsel fees arising therefrom, and deduct the same, and also whatever amounts may be paid for wages as before mentioned, from any money due or to grow due to the said contractor; and the said Railroad Company may from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf. And the said contractor shall forthwith pay the Railroad Company the amount of any deficiency arising from such payment for laborers or other workmen, and from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf. And the said contractor shall pay the deficiency arising therefrom upon demand.

The said contractor shall discharge any foreman or other employee who shall, in the judgment of the said chief engineer, be unfaithful, unskillful, or remiss in the performance of his work or guilty of riotous, disrespectful, or otherwise improper conduct, and no person so discharged on this work or any other work done for the said Railroad Company shall be employed again by the said contractor upon the work to be done under this agreement, without the written permission of the said chief engineer.

In all operations connected with the work embraced in this agreement, the said contractor shall be held responsible for any failure to respect, adhere to, and comply with all local ordinances and laws controlling or limiting, in any way, the actions of those engaged on the work or affecting the materials or the transportation or disposition of them.

And the said contractor hereby assumes all liability for and agrees to indemnify the said Railroad Company against all loss, cost or damage for or by reason of any liens, claims or demands for materials, or from laborers, or mechanics and others and from damages arising from injuries sustained by mechanics, laborers, or other persons, by reason of accident or otherwise, and from damages sustained by depositing materials to public injury, or to the injury of any person or corporation, including cost and expense of defense, provided that he be duly notified of the bringing of suits in such cases, and be permitted to defend the same by his own counsel if he should so elect.

Where the line of the railroad passes through farms, the said contractor shall keep such temporary fences as may be necessary for the preservation of the crops thereon. The said contractor shall be responsible for any damage that may be done by him or his workmen, during the performance of this work, to property adjacent

to the line, in consequence of his or their unskillfulness or negligence; and if any such damage shall be done, the said chief engineer shall have the right to settle and pay the same, and deduct the amount thereof from the payments to be made upon his estimates. Whenever any work herein embraced shall in any manner interfere with a public or private road, the said contractor shall keep a temporary roadway during such interferences at all times unobstructed and safe for travel, and any damage which may result from failure so to do, may be settled and withheld as above until paid by the said contractor.

If, in the course of the performance of this contract, or any work thereunder, it shall, according to the written opinion of the Chief Engineer, become necessary for the contractor to do any work, or to furnish any material not embraced in the foregoing classification, or for which no price is hereinbefore specified, then and in that event the Contractor shall if ordered in writing by the Chief Engineer, under and according to his directions, do all such work and furnish all such material and upon performance to the satisfaction of the Chief Engineer, the Contractor shall, at the periods and in the manner herein provided for payments under the contracts, receive therefor the reasonable value thereof, as the same be ascertained and determined by the Chief Engineer at approximately the rate of payment above fixed for work or material (if any such there be) of substantially similar character; or, in the discretion of the Chief Engineer, a separate contract for such work and material (if any) may be entered into by the Railroad Company with any person, and the person so contracting shall be permitted free access and facility in performing such work and furnishing such material; it being intended hereby to exclude, as far as possible, any claim for "extra" work (so called) and to provide for the most prompt, expeditious and economical prosecution of all work necessary to the principal undertaking.

The said Chief Engineer shall have the right to make any alterations that may be hereafter determined upon by him as necessary or desirable in the location, line grade, plan, form or dimensions of the work, either before or after the commencement of the same, defining them in writing and by or without drawings; and in case such alterations increase the quantities the said contractor shall be paid for such excess at the contract rates herein specified; but should such alterations diminish the quantity or extent of the work to be done, they shall not, under any circumstances be construed as constituting, and shall not constitute a claim for damages on any ground whatever, nor shall any claim be made on account of anticipated profits, nor on any account whatever in respect to the work which may be altered or dispensed with, the extent of this provision being that only the work absolutely done shall be paid for, and at the price named in this agreement.

No claim for extra work shall, under any circumstances, be made, allowed, or considered, unless the same shall have been done in pursuance of an order given in writing, as above provided, by the chief engineer, but nothing shall be deemed or construed as extra

work which can be classified, measured and estimated under the terms of this agreement.

No extra compensation shall be made to the said contractor for hindrances or delays from any cause in the progress of any portion of the work performed under this agreement; but if such delays or hindrances arise from any cause other than the fault of the said contractor, then, and in that case, the said contractor shall be entitled to such an extension of time for the completion of his contract as shall, in the opinion of the chief engineer, be sufficient to compensate for any such detention, provided the said contractor shall give notice, in writing, to the said Railroad Company of such hindrances and delays, stating the cause thereof, within twenty-four hours after the same shall first occur.

The said Railroad Company reserves the right to suspend, terminate or restrict the work embraced in this agreement for reasons not herein specified; and the said contractor hereby agrees to discontinue all work within ten days after receiving notice of such suspension or termination, in which case the contractor shall be entitled to payment in full for all materials actually handled or prior to said Notice at a valuation to be fixed by the Chief Engineer, subject to review as hereinafter provided, but shall make no claim for consequential damages or anticipated profits upon the work not actually performed, or damage of any kind resulting from such suspension or termination.

Any replacement or repairs rendered necessary upon or about the work herein contracted for, by reason of defective materials or workmanship furnished or performed by the said Contractor, shall be made by the said Contractor upon demand, without cost or expense to the Railroad Company.

And it is mutually agreed and distinctly understood that the decision of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relating to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law, or otherwise, by virtue of said covenants, so that the decision of the said Chief Engineer, James H. McRoberts, shall in the nature of an award be final and conclusive on the rights and claims of said parties.

If, for any reason, the said Chief Engineer, shall not be able to act, as provided in this clause, or shall not be the Engineer at the time of any such dispute, the said West Side Belt Railroad Company shall appoint one arbitrator and the said Contractor shall appoint a second arbitrator, and the said dispute shall be submitted to them, and if they agree, their award shall be final and conclusive between the parties, and if they cannot agree, the two arbitrators shall select a third arbitrator and the said matter in dispute shall be submitted to said arbitrators and a decision or award of a majority of them shall be conclusive and final between the parties.

This contract, and any and every provision thereof, may be modified or extended by the mutual agreement of the parties hereto, in writing, subject only to the approval of the Railroad Company.

In witness whereof, the parties hereto have duly executed these presents, the day and year first above written.

Witnesses present:
J. B. McKOWN.

[Documentary Stamp.]

A. S. PETRIE. [L. S.]
——— ———. [L. S.]
——— ———. [L. S.]
WEST SIDE BELT RAILROAD CO.,
[SEAL.] By JOHN S. SCULLY, *President.*

Attest:
J. B. McKOWN.
Secretary West Side Belt Railroad Company, Pittsburgh, Pa.

——— ———,
——— ———.

(Record, page 299.)

EXHIBIT "B."

Contract.

Articles of Agreement made and concluded this 24th day of May, A. D. 1901, by and between Pittsburgh Construction Company, of the first part, and A. S. Petrie, of the second part, Witnesseth

1. That for and in consideration of the covenants and payments hereinafter mentioned to be made and performed by the said party of the second part, the party of the first part hereby covenants and agrees to complete, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the Chief Engineer, James H. McRoberts, of the West Side Belt Railroad Company, all the grading, Masonry, Bridging and Trestle work, as well as the ballasting and track-laying, required for the aforesaid Railroad, a distance of about Twelve (12) miles, as shown by the Chief Engineer's Plans, Profile and Specifications of the line of the road of said Railroad Company, said work to be done agreeable to the directions and orders of the Chief Engineer, James H. McRoberts, of the West Side Belt Railroad Company, or his assistant, on or before the first day of March, A. D. 1902, and according to the Plans and Specifications, as follows, to wit:

Specifications for Grading, Masonry, Bridging, Trestle-work, Ballasting, Tunneling, Track-laying and Completing.

The Contractor shall, at his own expense, cost, and charge find and provide a full and ample supply of the best and most suitable tools and appliances required to be used in the performance of the said work, and to provide the best of materials of every kind that may be needed for the thorough and expeditious execution of said

work, and shall furnish and provide in sufficient numbers all mechanics, laborers, and other workmen, and also all things that may be necessary and requisite for constructing and completing, within the time herein stipulated, the whole of the work herein agreed to be done.

Grading.

1. The Grading will be estimated by the cubic yard and will include clearing and grubbing, and all open excavations, channels, and embankments required for the formation of the road-bed, and for turn-outs, and sidings; cutting all ditches or drains about or contiguous to the road; digging the foundation pits of all culverts and bridges or walls; reconstructing turnpikes or common roads in cases where they are destroyed or interfered with; changing the course or channel of streams; and all other excavation or embankments connected with or incident to the construction of said Railroad.

2. All grading, excepting where otherwise specified, whether for cuts or fills, will be measured in the excavations and will be unclassified, and when mentioned hereafter will mean without classification.

3. All materials taken from the excavations, except when otherwise directed by the Chief Engineer, or his assistant, shall be deposited in the adjacent embankment; the cost of removing and depositing which, when the distance necessary to be hauled is not more than two thousand (2000) feet, shall be included in the price bid for the excavation.

4. Extra haul will be estimated and paid for as follows: Whenever material from excavations necessarily hauled a greater distance than two thousand (2000) feet, there shall be paid, in addition to the price of excavation, the price of extra haul per 100 feet, for each 100 feet or part thereof, after the first two thousand (2000) feet; the necessary haul to be determined in each case by the said Chief Engineer from the profile and cross-sections, and the estimates to be in accordance therewith.

5. All embankments shall be made in layers of such thickness and carried on in such manner as the said Chief Engineer, or his assistant, may prescribe, the stone and heavy material being placed in the slopes and top. And in completing the fills to the proper grades, such additional heights and fullness of slope shall be given them, to provide for their settlement, as the said Chief Engineer, or his assistant may direct. Embankments about masonry shall be built at such times and in such manner and of such materials as the said Chief Engineer, or his assistant, may direct.

6. In procuring materials for embankments from without the line of the road, and in wasting materials from cuttings, the place and manner of doing it shall in each case be indicated by the Chief Engineer, or his assistant, and care must be taken to injure or disfigure the land as little as possible. Barrow-pits and spoil-banks must be left by the Contractor in a regular and sightly shape.

7. The land of the Railroad Company shall be cleared to the

extent required by the said Chief Engineer, or his assistant, of all trees, brushes, logs, and other perishable materials, which shall be destroyed by burning or deposited in heaps, as the said Chief Engineer, or his assistant, may direct. Large trees must be cut not more than two and one-half (2½) feet from the ground, and under embankments less than four (4) feet high, they shall be cut close to the ground. All small trees and bushes shall be cut close to the ground.

8. Clearing shall be estimated by the acre or fraction of an acre.

9. All stumps, roots, logs and other obstructions shall be grubbed out, and removed from all places where embankments occur less than two (2) feet in height; also, from all places where excavations occur, and from such other places as the said Chief Engineer, or his assistant, may direct.

10. Grubbing shall be estimated by the acre or fraction of an acre.

11. Contractors, *even* directed by the Chief Engineer, or his assistant, in charge of the work, will deposit on the side of the road, or at such convenient points as may be designated, any stone, rock or other materials that they may excavate; and all materials, excavated and deposited as above, together with all timber removed from the line of the road, will be considered the property of the Railroad Company, and the Contractors upon the respective sections will be responsible for its safe keeping until removed by said Railroad Company, or until their work is finished, excepting and reserving to the Contractor all stone or rock which may be approved by the Chief Engineer, or his assistant, as suitable for masonry or ballast to be used in the construction, and when directed so to do, this material shall be used upon the work by the Contractor.

12. Contractors will be accountable for the maintenance of safe and convenient places wherever public or private roads are in any way interfered with by them during the progress of the work. They will also be responsible for fences thrown down, and for gates and bars left open, and for all damages occasioned thereby.

13. Temporary bridges and trestles, erected to facilitate the progress of the work, in case of delays at masonry structures from any causes, or for other reasons will be at the expense of the Contractor.

14. The line of road, or the gradients, may be changed in any manner, and at any time, if the said Chief Engineer, or his assistant, shall consider such change necessary or expedient; but no claim for an increase in prices of excavation or embankment on the part of the Contractor will be allowed or considered, unless made in writing before the work on that part of the section where the alteration has been made shall have been commenced. The said Chief Engineer, or his assistant, may also, on the conditions last recited, increase or diminish the length of any section for the purpose of more nearly equalizing or balancing the excavations and embankments or for any other reason.

15. The road-bed will be graded as directed by the said Chief Engineer or his assistant and in conformity with such breadths, depths and slopes of cutting and filling as he may prescribe from

time to time, and no part of the work will be finally accepted until it is properly completed and dressed off at the required grade.

Double Tracks.

1. When excavations or embankments are being made for additional tracks, the party of the first part must at all times keep the work in such condition as not to interfere with the passage of the trains, and the said party will be held responsible for any delays or damages done to trains, contents or to the existing railroad tracks. Contractors will not be permitted to transport material by carts or wheelbarrows upon or between existing tracks under any circumstances. Said party must also provide the necessary watchmen, if instructed to do so by the Chief Engineer, or his assistant.

2. When it is necessary for the party of the first part to transport material from one side of the railroad to the other, the said party of the first part shall furnish the lumber and spikes for the crossing required, and all labor of placing down the same will be performed by the employees of the party of the second part, the actual cost of which shall be paid by the said party of the first part. No crossing shall be placed down except by the direction of the Chief Engineer, in writing.

Masonry.

1. All Masonry will be estimated by the cubic yard or twenty-seven (27) cubic feet, of the actual contents of the wall, and will be classified under the following heads: Bridge Masonry, Rectangular Culvert Masonry, Retaining Wall, Dry Wall and Concrete Masonry.

2. Bridge Masonry shall consist of three classes: Rock-Faced Ashlar, Broken-Range, and Random Rubble and either class may be used in any part of the structure, at the discretion of the said Chief Engineer, or his assistant.

(*a*) Rock-Faced Ashlar Masonry will generally be used in the piers of important bridges. The stone must be large and well proportioned, no course being less than twelve (12) inches nor more than twenty-four (24) inches deep, the depth decreasing regularly from bottom to top of wall. They must have a breadth of not less than their depth, not more than twice their depth, and a length from two to four times their depth. Their beds and joints must be accurately squared and worked to true surfaces with axe and chisel. The beds shall be parallel, and have a width of not less than once and a half their depth, and the joints must be squared at least twelve inches from the face.

The headers will be of similar size with the stretchers, and will hold the size in the heart of the wall which they show on the face. They shall be so arranged as to occupy one-fourth (¼) of the face of the wall.

The face stones shall have their faces pitched to a line and may be left with a quarry surface, except that the projections must be scabbed down so as not to exceed four (4) inches.

Whenever directed by the said Chief Engineer, or his assistant, the corners and other exposed portions, together with the copings,

shall be fastened together with iron clamps or dowels. Each stone shall be fitted accurately to its place, and shall be laid in a full bed of cement mortar so that the walls shall have joints not greater than one-quarter (¼) of an inch.

The backing stone shall be of large size, with top and bottom horizontal beds, each having three-fourths of the area of the greatest horizontal section of the stone. The facing and backing stone shall be laid close together and be thoroughly bonded, and the entire wall shall be filled with grout made with hydraulic cement, or laid in cement mortar, as shall be directed, in such manner as to complete each course separately before the next one is started. Piers are to have draughts on the corners, and to have dressed copings and bridge seats at least fourteen (14) inches thick, with level tops and square surface joints and edges.

(*b*) Broken-Range Masonry will generally be used for the wings of important abutments, and for the abutments of all culverts of more than six (6) foot span.

The stone used for this class of masonry will be generally of the same proportions as those used for Ashlar, but it will be sufficient to dress their beds to approximately true surfaces with the hammer; no face joint to be greater than one half inch.

They must be laid on their natural or quarry beds, and the beds must be of the largest size. As in Ashlar work, the stone must have horizontal beds and vertical joints.

All the spaces in the wall must be filled with sound stone of suitable size, entirely embedded in mortar, or the course must be thoroughly grouted, each course being finished before the next is begun. The back of this class of masonry will be laid with similar bond to that of the face. The face stones will be left with the quarry surface, except where the edges will be pitched to a true line, and a draught will be cut on the corners of the wall.

Cement mortar will be used throughout for this class of masonry.

(*c*) Random Rubble Masonry will in general be confined to the foundations, wing-walls and abutments of less important bridges, and of arch culverts of less than six feet span, and in the piers and footings for trestles. It will consist of stone averaging six cubit feet in each, and will be laid in irregular courses.

The beds must be roughly spawled off, must be the largest surface of the stone, and must lie horizontal in the wall.

The wall must be compactly laid, having at least one-fifth (1/5) the surface of the back and face headers, so arranged as to interlock, having all the spaces in the heart of the wall filled with suitable stones and spawls, and flushed with mortar which in less important structures may, with the consent of the said Chief Engineer, or his assistant be made with lime.

3. All bridge masonry must have the joints properly cleaned and pointed with hydraulic cement, and must have copings, which shall be classified as Ashlar Masonry, suitably dressed and proportioned to each structure.

The hammering or dressing of stones upon a wall where cement is used forbidden, and the stones must be lowered into place so as

not to disturb those previously laid. All dirt and sand must be carefully cleaned off from the beds where the stones are placed.

4. Rectangular Culvert Masonry, when not especially directed to be laid dry, will be laid in cement. The stones used will be two and three men stone, and the openings will be from two to three by four feet. The side walls will be built of good sized and well shaped stones, properly laid and bonded together, the upper course to have at least one-half headers entirely across the wall. The covering must be of sound, strong stone, at least twelve inches thick, and the stones must be spawled off so as to make close joints with each other, and must lap their whole width over not less than half the width of the walls, and must be doubled under high embankments. The head walls must be covered with suitable coping. When laid in mortar Rectangular Culverts will be classified as Random Rubble.

5. The paving of all culverts and other water courses will be built of carefully assorted stones of suitable size and shape, not less than twelve inches in depth, which will be set on edge in a bed of sand, or mixed sand and gravel, into which they will be thoroughly rammed. The paving will be secured at the ends by cross walls or curbs, thoroughly grouted with hydraulic cement.

Paving will be estimated dry or cemented, and will be measured by the cubic yard.

6. Retaining wall will include all kinds of rough rubble wall, composed of one and two men stone laid in lime mortar, or of large stone laid dry. The stone will generally be laid as they come from the quarry, only the rough projections requiring to be knocked off, but they must be so laid and bonded as to make a firm, strong wall.

7. Dry Wall will embrace Vertical Wall, Slope Wall and Rip Rap. Vertical Wall will include all light, dry, rubble work built of small stone for retaining the foot of embankments and other similar work. Slope Wall will be built of such thickness and slope as may be required in any case, and will be used to prevent banks, which are exposed to freshets, from washing. Rip Rap will be used to protect the foundations of masonry structures, and will be laid in such stone and in such manner as the said Chief Engineer, or his assistant, may in each case direct.

8. Concrete Masonry may be used, at the option of the Chief Engineer, in the heart of piers, walls, and abutments, instead of backing or filling, or in foundations to spread the load over the required area of bottom. It shall be composed of two parts of an approved cement, three parts of clean, sharp sand, and seven parts of sound stone broken to the size of one inch and two inches on a side. The sand and cement shall first be well mixed to a mortar and spread on a broad platform; the stone shall then be added to it and thoroughly mixed with the mortar until all pieces are covered with it. The concrete shall then be put in place immediately in layers not less than six inches nor more than twelve inches in depth, and thoroughly rammed. The layers shall be horizontal and none other begun until the underlying layer shall have set.

9. In every case the said Chief Engineer, or his assistant, will

direct what quality of masonry shall be used for each part of any structure, and it shall be the duty of the Contractor to see that the specifications are rigidly adhered to in every case, otherwise it shall be the duty of the said Chief Engineer, or his assistant, in estimating the quality and value of the work done to classify and return it under the head to which it most properly accords, and at the corresponding price; or he may reject the work altogether in which case the Contractor will be obliged to remove the work done and replace it with work as specified.

10. In all masonry the material used must be of a hard and durable quality, of good size and shape, and in character in every way suited for the class of masonry and purpose for which it is to be used, and must be approved by the said Chief Engineer, or his assistant. Only the best quality of lime, hydraulic cement, and clean, sharp sand may be used, and the mortar must be carefully mixed, of such proportion and of such manner as the said Chief Engineer, or his assistant, may direct.

Whenever stone, lime, sand or cement shall be pronounced by the Chief Engineer, or his assistant, unfit for the work, it shall be the duty of the Contractor at once to remove it out of the way.

11. The prices paid for masonry shall in every case include the furnishing of all materials, tools, scaffolding, &c., and all expenses attending the delivery of these to the work, and all risks from floods or otherwise.

12. No masonry of any kind must be covered up until inspected by the said Chief Engineer, or his assistant.

13. Plans and drawings for each structure will be furnished the Contractor, upon which will be noted the dimensions and character of each portion, and the finished work will be measured and estimated strictly in accordance with these and the specifications.

No constructive or conventional measurement will be allowed, any rule or custom in the section of the country through which the road passes to the contrary notwithstanding.

Foundations.

1. The foundation pits for all masonry structures shall be excavated by the Contractor in such manner and to such depth as the Chief Engineer, or his assistant, may direct.

2. That portion of bridge masonry which is below the natural surface of the ground, or below the ordinary level of the surface of water, shall be built in accordance with the directions of the Chief Engineer, or his assistant, and shall be estimated according to its quality, as

Foundation Rock-Face Ashlar.
" Broken-Range.
" Random Rubble.
" Concrete.

3. The price bid for such foundation masonry shall in every case include the furnishing of all materials, tools sheeting, coffer dams, caissons, pumping, &c., and all expenses attending the delivery of these materials to the work and all risks from floods or otherwise.

4. Whenever, in the opinion of the Chief Engineer, timber platform, cribs, piles, or other artificial foundations shall be necessary or advisable, they shall be supplied and put in place by the Contractor in such manner as the Chief Engineer, or his assistant, may direct, and shall be estimated as timber in foundations, or piles in foundations.

5. Timber in foundations shall be bid for by *one* the thousand feet, board measure, properly framed and in place.

6. Piles in foundations shall be of the best white oak, and not less than twelve inches in diameter at the smaller end, and shall be bid for by the lineal foot, driven to place and properly cut.

7. Whatever in the opinion of the said Chief Engineer, or his assistant, timber platforms, cribs, or other artificial foundations shall be necessary or advisable, they shall be supplied and put in place by the Contractor, ready to receive the masonry, in such manner as the Chief Engineer, or his assistant, may direct, and the Contractor will be compensated for this work at actual cost of materials and labor, with ten (10) per cent. added for superintendence and use of all necessary plant. Pumping, after the foundations are prepared, and during the laying of the masonry, to be done by the Contractor and at his expense.

Trestling.

The timber must be free from wind shakes, large knots, sap wood or any defects that will impair the strength or durability. No sap angles will be allowed. All timber will be inspected by the Engineer in charge and none used without his approval.

All framing must be done in a thorough and workmanlike manner.

The general form of the bent to be used is here shown:

The posts will be mortised into the caps and sills and boxed one-half inch into each piece. A one-half inch hole shall be bored from the bottom of each mortise in the sill down to the corner to prevent any water or dampness from accumulating therein.

The mortise shall be neatly cut into the timber and shall not exceed one-fourth the width of the piece of timber in which it is made and the tenon upon the posts shall be made to fit into the mortise tightly.

There shall be one, one inch locust pin, used in each mortise and tenon, the holes for which shall be bored so as to give a draw of one-eighth inch when driven.

The material composing the bents of this trestling shall be young, sound, hemlock, 12 x 12 square and of such lengths as may be required which will be shown by the Plans and Profile of the work.

The stringers shall be built of two pieces each and composed of Norway and Michigan Pine, 10 x 16 inches and bolted together as shown by the Plans.

The ties shall be 9 feet long and 7 x 10 inches square laid upon their flat surface 20 inches between centers and gained one inch over the stringers and composed of White or Yellow Oak.

The guard rail shall be composed of the same material as the

ties, 5 x 8 inches square and in length generally about 16 feet, and in no case less than 10 feet; it will be gained over the ties one and ½ inches and bolted to the same with ⅞ wrought iron bolts as shown by the Plans.

All materials of every kind and description whatsoever shall be furnished by the Contractor and all work done and material furnished shall be under the direction of the Chief Engineer, or his assistant, and subject to his inspection and approval.

The wrought iron used for the bolts, spikes, etc., in the erection of the trestling shall be of the best quality of American refined iron, tough, ductile and capable of standing a tensile strain of 50,000 pounds per square inch before rupture, and 25,000 pounds without exceeding the limit of elasticity.

There will be no castings used in the trestling except washers.

Ten bars of wrought iron shall be furnished by the Contractor without cost when required by the said Chief Engineer.

In the construction of the trestling, the Contractor will furnish all materials of every kind and description whatsoever except foundations, and will be bid for at so much per thousand feet Board measure for the actual amount of material used.

This price will include the furnishing of all bolts, spikes, rivets or any other material used in the construction thereof.

Ties.

All Cross and Switch Ties shall be furnished by the Contractor subject to the inspection and approval of the Engineer in charge of the work.

The Cross Ties shall be composed of White Black or Yellow Oak, or other sound timber of suitable character in the opinion of the Chief Engineer. They will be 8½ feet long and not more than 3 inches out of straight, hewed to a smooth surface on two parallel plain faces, 7 inches apart, the faces being not less than 8 inches wide for at least one-half the number and the remainder not less than 7 inches wide.

The Ties shall be carefully and solidly laid on the ballasting previously prepared so as to give the true plane required by the rails whether on straight or curved lines.

They shall be laid about two feet between centers. All imperfect ties shall be excluded by the track-laying party.

The surface of the ties shall be faithfully adjusted to the grades given and the web of the rail; and the rail to be truly and firmly spiked so as to correspond neatly to the alignment of the road.

There shall be about 2600 ties per mile of road.

Ties to be 8½′ x 7″ x 8″.

Cross Ties will be bid for at so much per tie.

Ballasting.

After the road-bed has been brought to a careful sub-grade and the material forming the road-bed properly compacted suitable to receive the ballast, it will be put on in layers, as follows:

The lower course shall be 6 inches in depth and composed of stone of a hard and durable quality approved by the Engineer, free from dirt or other impurities; stone to be of uniform size, and not larger than a cube that will pass through a 2½ inch ring.

All stone over 3½ inches in length which may pass through the 2½ inch ring, must be broken by hand while being loaded in cars, or before placed upon the sub-grade. Stone to be screened free from dirt or dust, by passing it over a plate screen punched with 49 holes per square foot; the holes to be ⅞ inch in diameter and the plate to be of such dimensions as to insure slow movement of all stone in a uniformly even layer in order to effectually clear the same of all small pieces, dirt, etc.

After the surface has been brought to a uniform grade, 6 inches above sub-grade, the ties placed and the rails spiked thereon and brought to a true surface, a filling of back ballast shall be placed between the ties; said ballast to be composed of the same material as the first course, and brought to a uniform surface level with the top of the tie or bottom of the rail and extending out even with the end of the tie.

Ballasting shall be bid for by the square yard, complete.

Steel Rails.

Specifications for Steel Rails Adopted by the West Side Belt Railroad, November 16, 1896.

The contractor will be required to see that in the manufacture of Steel Rails, the different Rolling Mills and Rail Inspectors will comply with the specifications following:

First. The steel used for the rails shall be made in accordance with the "Pneumatic" or "Open Hearth" process and contain not less than 40/100 or more than 50/100 of one per cent. of Carbon.

Second. The result of the carbon test of each charge of which the West Side Belt Railroad is to receive rails and of which an official record is kept at each mill, is to be exhibited to the Rail Inspector.

Third. A Test Bar of three quarters of an inch wide and ten inches long to be taken from the web of the rail made from each charge, is to be furnished to the Railroad Company's Inspector for use in making an analysis and test of the steel, whenever required.

Fourth. The number of the charge, and place, and year of manufacture, shall be marked in plain figures and letters on the side of the web of each rail.

Fifth. The weight of rails shall be kept as near to Standard Weight of 80 pounds per yard, adopted by the West Side Belt Railroad Company as it is practical so to do.

Sixth. The section of the rail shall correspond with the respective templet showing the shape and dimensions of the rail adopted as Standard, as near as it is practicable after complying with Section 5.

Seventh. The space between the web of the rail and templet representing the splice-bar shall not be less than ¼ of an inch and not more than ⅜ of an inch.

Eighth. Circular holes one inch in diameter shall be drilled through the web in the center thereof at equal distances from the upper surface of the flange and the lower surface of the head, 1 15/16 inches from the end to the center of the first hole; and 5 inches from the center of the first hole to the center of the second hole; and 6 inches from the center of the second hole to the center of the third hole; also a fourth hole shall be drilled in the center of the web 1 1/16 inches in diameter and 7 inches from the center of the third hole to the center of the fourth hole. This fourth hole is intended for electric connection.

Ninth. The length of rails at 60 degrees Fahrenheit shall be kept within 1/4 of an inch of their standard lengths which are 30 feet, with ten per cent. shorter lengths when especially mentioned in the contract; none under 20 feet in length.

Tenth. The rough edges produced at the ends of the rails by the saw shall be well trimmed off and filed.

Eleventh. All rails are to be straightened in order to insure a perfectly straight track.

Twelfth. The causes for the temporary rejection of the rails are:

1. Crooked rails.

2. Imperfect ends which after being cut off would give a perfect rail of one of the standard short lengths.

3. Missing test reports.

4. Variations of more than one-fourth inch from the Standard lengths.

Thirteenth. The causes for the permanent rejection of a rail, are:

1. A bad test report showing a deficiency or excess of carbon.

2. The presence of a flaw of 1/4 of an inch in depth in any part of the rail, or any material flaw in the head of the rail.

3. A greater variation between the rail and splice bar than is allowed in paragraph No. 6.

4. The presence of such other imperfections, as may involve the possibility of the rail breaking in the track.

Track Laying.

All materials of every kind and description whatsoever including rails, splice-bars, frogs, switches, switch machinery, etc., composing the track will be furnished by the Contractor and shall be laid in the best manner according to the following conditions:

The Cross Ties will be placed upon the ballast uniformly distant 24 inches between centers.

A slip of metal shall be inserted at the rail joints while laying the track to keep the rails sufficiently apart to allow for expansion, which thickness depending upon the temperature, shall be fixed by the Engineer in charge of the construction.

Two spikes shall be used at each end of the tie, one inside and one outside of the rail upon straight lines.

Upon curves of less than 1000 feet radius, two spikes outside and one spike inside the rail at each end of the tie, shall be used.

Upon the curve, the outer rail will be raised to such an amount

depending upon the radius of the curvature as the Engineer may direct.

And when the track is completed in every detail, it must be tamped solid, carefully surfaced and made to conform neatly to both gradient and alignment as given by the Engineer in charge.

Contractors will bid by the lineal foot for track actually laid, which shall include turn-outs, measuring from point to point of the switches. No extra allowance being made for putting in frogs or switch machinery.

The price bid per lineal foot must include the furnishing of rails, spikes, plates, and bolts and everything necessary to make a complete track, exclusive of the ties and ballast.

Frogs and Switches.

The Frogs used as Turn-outs from the main line shall be what is known as "The Spring Rail Frog" made from rails containing the same section exactly to correspond with the respective templet showing the shape and dimension of the rail adopted as Standard by the Company; the rail to contain eighty (80) pounds per yard, as near as it is practicable so to do.

Switches shall be what is known as "The Split Switch", with Tie Bars, Stand Sections and all machinery of the most approved pattern, and made to work smoothly with certainty before the track will be approved by the Engineer.

Bridging.

Bridging will be constructed either of Iron, Steel or Wood, or a combination of them.

Contractors will furnish a general plan with detail drawings and diagrams of strains for all bridges and iron trestles, otherwise their tenders will not be considered.

Through bridges must not be less than fourteen (14) feet in width in the clear and twenty (20) feet in height in the clear, measuring from the top of the rail.

Rolling Load.

All parts of bridges and trestles must be proportioned to sustain the passage of the following rolling load at a speed of not less than forty (40) miles per hour, viz:

Two locomotives coupled, each weighing 120 tons and followed by a load of 4000 pounds per lineal foot; weight of each locomotive and tender to be distributed according to the following diagram:

An addition of from ten to thirty per cent. will be made to the strains produced by the rolling load (strain as static) in the calculation of floor beams, stringers, suspension links, counter-rods and all other parts which are liable to be thrown under strain by the passage of a rapidly moving load. Bridges must not deflect under the passage of such a train more than one-twelve hundredth of their length and shall return to their original camber.

Trestle posts, verticals, lateral rods and struts must be of sufficient

strength to resist, in addition to the live and dead load, a pressure of wind equal to thirty pounds per square foot when the trestle is covered with passenger cars.

In bridges, the verticals, lateral rods and struts must be of sufficient strength to resist in addition to the live and dead load, a pressure of wind equal to fifty pounds per square foot, unless otherwise specified.

The Iron Work shall be proportioned that the weight of the structure including the floor with 150 pounds per lineal yard added for rails, spikes, and joints, together with the above specified rolling load, shall in no part cause a tensile strain of more than ten thousand pounds per square inch of sectional area, nor a shearing strain of more than seven thousand five hundred pounds to the square inch.

Columns for testing will be furnished by the Contractor.

Experiments will be made under the direction of the Engineer to determine the limit of elasticity and also the ultimate strength of the metal to be applied in the Formula.

In all members subject to transverse strains, the maximum compression must not be more than 8000 pounds per square inch.

Shearing strain on pins must not be more than 7500 pounds per square inch.

The strain on semi intrados of eyes must not be more than 10,000 pounds per square inch, or the compressive area not less than the section of the bar. The eye must not be less in strength than the body of the bar.

Quality of the Iron.

The Iron used under tensil- strain shall be tough, ductile, of uniform quality, capable of sustaining 60,000 pounds per square inch of sectional area without fracture, and 25,000 pounds per square inch of area with a smart blow of a hammer while under strain without taking a permanent set.

The reduction of area at break or joint shall not average 25 per cent; elongation 15 per cent.

When cold it must bend without sign of fracture from 90 to 180 degrees.

Iron used under compressive strain must be tough, highly fibrous, of uniform quality and capable of sustaining 25,000 pounds per square inch of area without taking a permanent set.

The Engineer will have the privilege at any time to select any of the bars manufactured for the bridge and cut from the same specimen bars 1½ inches in diameter and 12 inches long and submit them to the foregoing tests. Should the bars thus tested fail to stand the tests, this will be considered sufficient evidence that the iron used does not comply with the requirements of the specifications.

All bars subjected to tensile strain shall be tested by the Contractor under the direction of the Engineer, to twenty thousand pounds per square inch sectional area with a smart blow of a hammer while under strain without permanent set. While under the

test strains, should any bar extend or contract more or less than it should do according to co-efficients, extension and contraction, previously determined from experimental tests of sample bars of the grade of iron to be used, all such bars shall be rejected for this, or any other imperfection.

The variation of the one one-thousandth of an inch per foot each way for the strain of twenty thousand pounds per square inch of area will be allowed.

Bars subjected to shearing strain shall be of the best quality of iron and subjected to such tests as the Engineer may desire.

Castings must be made of good, tough, cast iron metal, not less than ¾ of an inch in thickness, to be subjected to the following test: a bar of iron five feet long, one inch square, 4 feet 6 inches between supports, shall bear a weight of 550 pounds suspended at the center.

The Engineer may at any time require such specimen bars to be cast from the same metal as that used in the structure.

No castings will be permitted except in the minor details.

Workmanship.

All workmanship must be first class.

All abutting joints must be planed or turned. 1/64 of an inch will be the maximum error allowed in any eye bars, and not more than 1/100 of the diameter of the pin or hole.

Any riveted work in joints shall be square and truly dressed. Rivet holes shall be spaced accurately and directly opposite each other. Rivets must be of the best quality of iron and must completely fill the holes.

The area of the rivets shall not be less than the sectional area of the jointed pieces. The ends of bars having threads upon them must be enlarged beyond the diameter of the bar enough to make the bar full size at the bottom of the thread.

Washers and nuts must have a uniform bearing.

All iron must be painted on all surfaces before leaving the shop with one coat of metallic paint and oil, and with three coats of lead and oil after the structure is erected.

Tests.

Before the final estimate is paid a thorough test of the structure will be made by the Engineer by loading each span with such rolling load at such rate of speed as is described under "Rolling Load," and also by causing the load to remain on each span for the space of one hour or more and each span must return to its original camber when the load is removed.

Iron Trestle Work.

Iron Trestle Work will be built in spans of Twenty-five feet or upwards in length, supported by trestle in vertical sections of 50 feet and fractions of fifty feet as each particular case may require.

Trestle posts must be at least 10 feet from center to center at the top. The trestle work will be measured and bid for as follows:

The entire length of trestle work measured on the central line of the structure from center to center of end pins at so much per lineal foot.

Materials in trestles must be proportioned to support the corresponding span.

General Conditions.

Applicable to Bridges and Trestles.

Contractors must furnish and put in place wall plates, stringers, cross-ties, guard rails and angle iron over piers and abutments for all structures so as to connect the roadway of the structure with the ballasted track.

No extra allowance will be allowed for the same.

The Contractor shall take all risks of floods and casualties of every description and must furnish all materials and labor incidental to or in any way connected with the manufacture and erection of the structure.

All bridges will be measured from center to center of end pins. All bridges and trestle work must be completed ready for the rails.

General Directions.

1. Contractors must satisfy themselves, by careful personal examination, of the nature and location of the work they bid for, of the general form of the surface of the ground and all other matters which can in any way influence their contracts; and no information upon any such matters derived from the maps, plans, profiles, drawings, or specifications, or from said Chief Engineer or his assistant, shall in any way relieve the Contractor from any risk, or from fulfilling any of the terms of this agreement.

2. Fences, buildings, timber, and wood on the right of way along the line of the road are the property of either the land-owner or the Railroad Company, and if not removed by the land-owner within a reasonable time, shall be cleared off by the Contractor, piled up and preserved for the use of the Railroad Company without charge.

3. In case one portion of the work contracted to be done in accordance with these specifications is delayed through the negligence or incompetence of a Contractor for some other portion of the work, whatever damage may result to, or whatever expense may be incurred by the Contractor so delayed, because of such negligence or incompetency, shall not in any manner constitute a claim against the Railroad Company for any compensation on account of said delay, damage or expense; and it is expressly understood and agreed that no claim against the Railroad Company shall be made on account of any such delay, damage or expense.

4. Any person having permission from the said Chief Engineer, or his assistant, shall be allowed to pass along or haul any materials required for the road over any section, such persons not interfering with or impeding the work of the Contractor.

5. Contractors must carefully preserve all bench-marks and stakes,

and in case of wilfull or careless neglect they shall be charged whatever the said Chief Engineer shall consider an equitable amount to cover any damage arising from such negligence.

6. All excavations or embankments shall conform to the line and stakes set out by the Chief Engineer, or his assistant, and any excess of excavation or waste or material required for embankments at the mouth of cuts, due to the neglect of these lines and stakes, shall not be estimated or paid for.

7. Contractors must clear away the surplus stone and wreckage from masonry sites after the jobs are done; and before the completion of each section, have blasted rock and all other cumber accumulated during the construction removed from adjacent properties, bermes, and highways.

8. The word "grade" whenever herein used, refers to the surface of the road-bed as completed and prepared for the reception of ballast.

9. Whenever the words "his assistant" are used in these specifications, in connection with the words "Chief Engineer," they refer and relate to the regularly appointed assistants in the various positions of engineer in Charge, Principal Assistant Engineer, Division Engineer, Resident Engineer, or Assistant Engineer of the Railroad Company in charge of the particular work, and to no other assistant of the Chief Engineer, or other employee of the Railroad Company. Whenever the words "his assistant" are not used in connection with the words "Chief Engineer," it is intended that the Chief Engineer shall have the sole and exclusive jurisdiction of the subject.

During the progress of the work, as long as the contractor shall fully comply with the terms of this agreement, the Railroad Company shall, upon or about the fifteenth day of each calendar month, and at such place as may from time to time be designated by the Chief Engineer, make to the Contractor an advance payment for and on account of the work done and materials furnished during the last preceeding calendar month: the quantity, character and value of such and material to be estimated and certified by the Chief Engineer with his written approval; such estimate to be based upon the price bid as follows:

For Clearing, at $10.	Per Acre.
For Grubbing, at $10.	" "
For Excavation 38 cents	" Cubic yard.
For Rock-Faced Ashlar Masonry $7.	" " "
For Broken-Range Masonry $6.	" " "
For Pedestal Masonry $5.	" " "
For Concrete Masonry $5.	" " "
For Rectangular Culvert Masonry $3.50	" " "
For Paving, Dry sq. yd.	" " "
For Paving, Cemented, $3.	" Sqr. "
For Vertical Wall $1.75	" Cubic "
For Slope Wall $1.75	" " "
For Rip Rap $1.50	" " "
For Trestling $38.	" M. Ft. B. M.
For Ties 60 cents	" Tie.
For Ballasting 33 cents	" Square Yard.

For Track-laying (including material as specified) 71¢ per Lineal ft.

For Vitrified Pipe,	24	inch	$1.	Per Lineal	Foot.
" " "	15	"	$1.	" "	"
" " "	12	"	.75¢	" "	"
" " "	10	"	.50¢	" "	"

For Steel Bridging $30.

For the whole work complete $388,695.44 as per quantities bid upon.

Such advance payment not to exceed eighty-five per cent. of the value as thus estimated and certified. Such certificates may be based on either actual measurement or simple estimate, or both combined, as shall be approved by the said Chief Engineer, and, except as otherwise determined by the Chief Engineer, no amount so estimated and certified, nor any amount, shall in anywise be deemed payable nor shall the same be in any manner transferable or assignable either by the act of the Contractor or by the operation of law, as a subsisting debt, or liability of the Railroad Company, until the final estimate shall have been made and become payable as hereinafter provided, nor (except at the option of the Company) until all amounts payable to laborers, sub-contractors, or material men shall have been fully paid, or the payment thereof secured to the satisfaction of the Chief Engineer. The portion of each amount certified (being not less than a sum equal to fifteen per cent. thereof) reserved by the Railroad Company shall be by it retained forever as compensation for or on account of any damages which may be certified by the Chief Engineer to have been by it sustained from any failure of the Contractor to perform this contract, and the work thereunder as herein provided; but any part thereof not required as such compensation shall be payable and paid to the same person at the same time and upon the same conditions as the final payment under this contract hereinafter provided for. And it is further provided that in the discretion of the Chief Engineer, or of the President of the Railroad Company, a larger proportionate part of than fifteen per cent. but not to exceed twenty-five per cent. of each monthly certificate may be retained by the Railroad Company, as a protection against over-payment for work done as compared with that remaining to be done; and at all times it shall be wholly discretionary with the Railroad Company to make any payments on account of material delivered and not permanently applied to the work for which it may have been intended.

Every monthly estimate shall, for the time being, be conclusive upon both parties hereto, but being made merely as a basis for payment on account, though with a great desire and effort for accuracy, may be only approximately correct, and therefore, shall be subject to correction by the Chief Engineer, in any subsequent monthly estimate, or in the final estimate; and no such monthly estimate or certificate for unfinished work shall be considered or taken as acceptance of the work, or as a release of the said Contractor from responsibility therefor, nor as controlling the Chief Engineer

in the final certificate, which alone shall operate as an acceptance of the work, or as a release to the Contractor.

When this agreement, in all its parts and in the manner herein provided, shall have been completely performed on the part of the Contractor, and such performance shall have been accepted and so certified in writing by the said Chief Engineer, a final estimate of the quantity, character and value of the work done and materials furnished, according to the terms of this agreement, shall be made by the Chief Engineer, and thereupon and not otherwise sooner, except at its own election, the said Railroad Company shall, within (30) days thereafter, pay to the said Contractor, upon his giving a release under seal to the said Railroad Company from all claims or demands whatsoever growing in any manner out of this agreement, all sums of money so certified by the said Chief Engineer to be then remaining due and unpaid upon the work performed under this agreement, after first deducting therefrom any and all sums herein provided to be retained by the said Railroad Company; it being expressly understood that such final estimate and certificate of the Chief Engineer shall be conclusive upon the parties.

And it is further distinctly understood and agreed, the said Contractor shall not assign or sublet the whole or any part of this agreement (or any work to be done thereunder) without having first obtained the consent, in writing, of the said Railroad Company thereto, through its Chief Engineer.

If at any time during the progress of the work, it shall appear to the Chief Engineer

(*a*) That the work does not progress with reasonable speed; or (*b*) that the force employed, the quantity or quality of tools, appliances, or workmen provided, or work done or materials furnished, are not respectively such as to insure the completion of the work within the agreed time, or not in accordance with the specifications hereto annexed; or (*c*) that the Contractor has unreasonably failed to pay laborers and workmen or overseers for work performed under this agreement; or (*d*) that legal proceedings have been instituted by parties other than the Railroad Company against the Contractor in such manner as to interfere with the prosecution of the work, or to subject the Railroad Company in making further payments under this contract to the peril of litigation or outside claims; or (*e*) that the Contractor is failing in any matter of substance to observe and perform this contract,—then, and in either of such events, such fact or condition, may be fully ascertained and declared by the Chief Engineer, over his signature, in a writing to be filed with the Railroad Company, and a copy thereof shall be served on the Contractor, either in person or by mailing the same to him at the address by him last given to the Railroad Company, or by posting the same on the door of his office on or near the work, and at any time after the service as aforesaid of such certificate by the Chief Engineer, the Chief Engineer may take the following course:

The Chief Engineer may, by a writing similarly served (of which a copy shall be filed with the Railroad Company) require the Contractor to at once supply such increase of force, appliances or tools, and to

cause to be made such improvement in the character of the work and materials as may be required, in the opinion of the Chief Engineer to make the same conform to the stipulations of this agreement and the specifications; and if on the expiration of ten days after such service of such writing, the Contractor shall have failed to furnish to the Railroad Company evidence satisfactory to the Chief Engineer of the intention and ability of the Contractor to furnish the desired improvements and remedy the specified deficiencies, the said Railroad Company may thereupon enter on and take possession of said work, or any part thereof, with the tools, materials, plant, appliances, houses, machinery, or other appurtenances thereon, and hold the same as security for any or all damages or liabilities that may arise by reason of the non-fulfillment of this agreement within the time herein stipulated; and furthermore, may employ the said tools, materials, &c., as aforesaid, and such other means as the said Railroad Company may deem proper to complete the work, at the expense of the said Contractor, and may deduct the cost of completing the entire work from any payments then due or thereafter falling due to the said Contractor, and recover from him any and all deficiency.

And immediately upon, from and after the service as aforesaid of the last mentioned writing, all right of occupancy in or upon any lands or property of the Railroad Company, and all rights of the Contractor, or of any person claiming under or through him, to any further prosecution of or interest in the work, shall cease and determine, and the Railroad Company may take possession of such lands or property and complete the work thereon in such manner and by such means as it may think best.

And it is further understood and agreed that if, at any time, the Contractor shall refuse or neglect to prosecute the work with a force sufficient, in the judgment of the Chief Engineer, for its completion within the time specified, then, and in that case, the Railroad Company may proceed to employ such a number of workmen, laborers and overseers as, in the opinion of the Chief Engineer, may be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as the Railroad Company may find necessary or expedient, and may pay all persons so employed and charge all amounts so paid as so much money paid to the Contractor under this contract.

And it is further agreed and understood that if the Contractor shall not complete the said work within the time herein specified, and the said Railroad Company shall, notwithstanding such failure, permit the said Contractor to proceed with or complete the said work, as if such time had not elapsed, such permission shall not be deemed a waiver in any respect, by the said Railroad Company, of any forfeiture or liability for damages or expenses thereby incurred arising from such non-completion of the said work within the time specified, but such forfeiture or liability shall still continue in full force against the said Contractor as if such permission had not been granted. And it is further distinctly understood and agreed,

that time, whenever involved in this agreement, is of the essence of this agreement.

In all cases of non-payment of the said Contractor of any sum or sums of money due the laborers or other workmen for work performed under this agreement, the said Railroad Company is hereby authorized to pay such laborers or workmen the amounts due and owing them by the said Contractor; and if any action or proceeding at law or in equity shall be instituted by virtue of any law or statute now in force, or hereafter enacted, for labor and wages on said work, the said Railroad Company may pay all damages, wages, recoveries, costs, expenses and counsel fees arising therefrom, and deduct the same, and also whatever amounts may be paid for wages as before mentioned, from any money due or to grow due to the said Contractor; and the said Railroad Company may from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf. And the said Contractors shall forthwith pay the Railroad Company the amount of any deficiency arising from such payment for laborers or other workmen, and from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf. And the said Contractors shall pay the deficiency arising therefrom upon demand.

The said Contractors shall discharge any foreman or other employee who shall, in the judgment of the said Chief Engineer, be unfaithful, unskillful, or remiss in the performance of his work or guilty of riotous, disrespectful, or otherwise improper conduct, and no person so discharged on this work or any other work done for the said Railroad Company shall be employed again by the said Contractor upon the work to be done under this agreement, without the written permission of the said Chief Engineer.

In all operations connected with the work embraced in this agreement, the said Contractor, shall be held responsible for any failure to respect, adhere to, and comply with all local ordinances and laws controlling or limiting, in any way, the actions of those engaged on the work or affecting the materials or the transportation or disposition of them.

And the said Contractor hereby assumes all liability for and agrees to indemnify the said Railroad Company against all loss, cost or damage for or by reason of any liens, claims or demands for materials, or from laborers, or mechanics and others and from damage arising from injuries sustained by mechanics, laborers, or other persons, by reason of accident, or otherwise, and from damages sustained by depositing materials to public injury, or to the injury of any person or corporation, including cost and expense of defense, provided that he be duly notified of the bringing of suits in such cases, and be permitted to defend the same by his own counsel if he should so elect.

Where the line of the Railroad passes through farms, the said Contractor shall keep such temporary fences as may be necessary for the preservation of the crops thereon. The said Contractor shall be responsible for any damages that may be done by him or his workmen, during the performance of this work, to property ad-

jacent to the line, in consequence of his or their unskillfulness or negligence; and if any such damage shall be done, the said Chief Engineer shall have the right to settle and pay the same, and deduct the amount thereof from the payments to be made upon his estimates. Whenever any work herein embraced shall in any manner interfere with a public or private road, the said Contractor shall keep a temporary roadway during such interference at all times unobstructed and safe for travel, and any damages which may result from failure so to do, may be settled and withheld as above until paid by the said Contractor.

If, in the course of the performance of this contract, or any work thereunder, it shall according to the written opinion of the Chief Engineer, become necessary for the Contractor to do any work, or to furnish any material not embraced in the foregoing classification, or from which no price is hereinbefore specified, then and in that event the Contractor shall if ordered in writing by the Chief Engineer, under and according to his directions, do all such work and furnish all such material and upon performance to the satisfaction of the Chief Engineer, the Contractor shall, at the periods and in the manner herein provided for payments under the contracts, receive therefor the reasonable value thereof, as the same be ascertained and determined by the Chief Engineer, at approximately the rate of payment above fixed for work or material (if any such there be) of substantially similar character; or, in the discretion of the Chief Engineer, a separate contract for such work and material (if any) may be entered into by the Railroad Company with any person, and the person so contracting shall be permitted free access and facility in performing such work and furnishing such material; it being intended hereby to exclude, as far as possible, any claim for "extra" work (so called) and to provide for the most prompt, expeditious and economical prosecution of all work necessary to the principal undertaking.

The said Chief Engineer shall have the right to make any alterations that may be hereafter determined upon by him as necessary or desirable in the location, line, grade, plan, form or dimensions of the work, either before or after the commencement of the same, defining them in writing and by or without drawings; and in case such alterations increase the quantities, the said Contractor shall be paid for such excess at the contract rates herein specified; but should such alterations diminish the quantity or extent of the work to be done, they shall not, under any circumstances be construed as constituting, and shall not constitute a claim for damages on any ground whatever, nor shall any claim be made on account of anticipated profits, nor on any account whatever in respect to the work which may be altered or dispensed with, the extent of this provision being that only work absolutely done shall be paid for, and at the price named in this agreement.

No claim for extra work shall, under any circumstances, be made, allowed, or considered, unless the same shall have been done in pursuance of an order given in writing, as above provided, by the Chief Engineer, but nothing shall be deemed or construed as extra work

which can be classified, measured and estimated under the terms of this agreement.

No extra compensation shall be made to the said Contractor for hindrances or delays from any cause in the progress of any portion of the work performed under this agreement; but if such delays or hindrances arise from any cause other than the fault of the said Contractor, then, and in that case, the said Contractor shall be entitled to such an extension of time for the completion of his contract as shall, in the opinion of the Chief Engineer, be sufficient to compensate for any such detention, provided the said Contractor shall give notice, in writing, to the said Railroad Company, of such hindrances and delays, stating the cause thereof, within twenty-four hours after the same shall first occur.

The said Railroad Company reserves the right to suspend, terminate or restrict the work embraced in this agreement for reasons not herein specified; and the said Contractor hereby agrees to discontinue all work within ten days after receiving notice of such suspension of termination, in which case the Contractor shall be entitled to payment in full for all materials actually handled or prior to said Notice at a valuation to be fixed by the Chief Engineer, subject to review as hereinafter provided, but shall make no claim for consequential damages or anticipated profits upon the work not actually performed, or damage of any kind resulting from such suspension or termination.

And replacement of repairs rendered necessary upon or about the work herein contracted for, by reason of defective materials or workmanship furnished or performed by the said Contractor, shall be made by the said Contractor upon demand, without cost or expense to the Railroad Company.

And it is mutually agreed and distinctly understood that the decision of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relating to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law, or otherwise, by virtue of said covenants, so that the decision of the said Chief Engineer, James H. McRoberts, shall in the nature of an award be final and conclusive on the rights and claims of said parties.

If, for any reason, the said Chief Engineer, shall not be able to act, as provided in this clause, or shall not be the Engineer at the time of any such dispute, the said West Side Belt Railroad Company shall appoint one arbitrator and the said Contractor shall appoint a second arbitrator, and the said dispute shall be submitted to them, and if they agree, their award shall be final and conclusive between the parties, and if they cannot agree, the two arbitrators shall select a third arbitrator and the said matter in dispute shall be submitted to said arbitrators and a decision or award from a majority of them shall be conclusive and final between the parties.

This contract, and any and every provision thereof, may be modified or extended by the mutual agreement of the parties hereto in writing, subject only to the approval of the Railroad Company.

In witness whereof, the parties hereto have duly executed these presents, the day and year first above written.

PITTSBURGH CONSTRUCTION COMPANY,
By C. L. McKENZIE, *Pres.* [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

[P. C. Co.'s Seal.]

Witnesses present:
HENRY J. WURNEBURG.
A. S. PETRIE.
—— ——.

[Stamp dated May 24, 1901.]

Witness:
JAMES H. McROBERTS.

For value received, The West Side Belt Railroad Company and John S. Scully and T. N. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in the within contract as the same becomes due and payable.

In witness whereof, the said West Side Belt Railroad Company has hereunto set its common corporate seal, by the hands of its President, attested by its Secretary, and the said John S. Scully and T. N. Barnsdall have hereunto set their hands and seals this 24th day of May, A. D. 1901.

WEST SIDE BELT RAILROAD COMPANY.
By JOHN S. SCULLY, *President.*

[W. S. B. R. Co.'s Seal.]

Attest:
J. B. McKEOWN, *Secretary.*

JOHN S. SCULLY. [SEAL.]
T. N. BARNSDALL. [SEAL.]

Witness:
JAMES H. ROBERTS, *As to Both.*

The West Side Belt Railroad Company hereby guarantees the payment of the money mentioned in the within contract as the same becomes due and payable.

In witness whereof, the said West Side Belt Railroad Company has affixed its common and corporate seal attested by the President and Secretary.

WEST SIDE BELT R. R. CO.,
By —— ——, *President.*

Attest:
—— ——, *Secretary.*

(Record, page 402.)

C. P. No. 4, Allegheny County, Pennsylvania.

No. 398, Fourth Term, 1907.

PITTSBURGH CONSTRUCTION COMPANY
vs.
WEST SIDE BELT RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

1. B. A. Worthington, being sworn, says he is Vice President and General Manager of the defendant company, and that he makes this affidavit for defendant having full authority so to do. He makes the statements herein contained not upon personal knowledge, but upon information and belief, which he believes to be true and expects to prove upon the trial of this case.

2. He says that the defendant admits the following averments contained in the statement of claim:

That the West Side Belt Railroad Company is a corporation of Pennsylvania.

3. That the Pittsburgh Construction Company is a corporation of West Virginia, incorporated May 14, 1901. That on June 15, 1901 it was duly registered in the office of the Secretary of the Commonwealth of Pennsylvania at Harrisburg, Pa. and on that day established a known place of business and designated an authorized agent for the transaction of business in the Commonwealth of Pennsylvania.

4. That the defendant made the contract with A. S. Petrie as shown on Exhibit A. attached to the statement of claim.

5. That A. S. Petrie made the contract with plaintiff shown on Exhibit B. attached to the statement of claim and that this defendant signed said contract with John S. Scully and Theodore Barnsdall as guarantors for the said A. S. Petrie.

6. That during the progress of the work payments were made by the defendant to the plaintiff on account thereof upon monthly estimates of its Chief Engineer. The amounts and times of such payments being as shown in the recapitulations attached to plaintiff's Exhibit D. annexed to the statement of claim amounting to $540,-737.63.

7. That the work done by plaintiff was accepted by the defendant as completed on June 11th, 1903.

8. That during the construction of the said railroad for defendant it made certain changes in the location of its line of railroad and in the grade, plan, form and dimensions of the work, as shown in the original plans, specifications and details thereon.

9. That on September 11th, 1902, H. T. Douglass was appointed Chief Engineer of the defendant Company and James H. McRoberts

at the same time was appointed its consulting engineer and that they continued to hold said respective offices until September 16, 1903.

10. That in the month of September, 1903 said H. T. Douglass, as Chief Engineer of defendant, made the final estimate of all work and materials furnished under the contract, as well as the extra work under it, showing a balance due and unpaid by defendant to plaintiff of $82,324.03 and that upon the delivery of the said estimate to it, defendant set up a claim of damages against the plaintiff for non-completion of the work on it, amounting to more than such unpaid balance.

11. That defendant on Sept. 16, 1903, reappointed J. H. McRoberts its chief engineer and on the following day he issued the notice to the plaintiff as shown on Exhibit E. attached to plaintiff's statement of claim, stating that he would hear the parties hereto upon this question of the railroad company and that the parties appear before such referee.

12. It is also true that the said referee signed the Exhibits F. and G. attached to plaintiff's statement of claim. All other statements contained in the statement of claim are hereby expressly denied and proof thereof is required of plaintiff. For additional and more specific denial of plaintiff's statement of claim, deponent says:

13. That defendant denies that upon execution of Exhibit B., being the contract between A. S. Petrie and the plaintiff, that this defendant adopted the same as its contract. It did nothing more than assent to that contract and it did thereafter control and direct the work done by the plaintiff as sub contractor under Petrie, as it had a right to do under its contract with Petrie.

14. Deponent says that as the work progressed, the plaintiff presented claims to the defendant and made itemized statement of its claims to defendant of all the work and labor done and materials furnished by it up to the time of such statements whether they were within or in addition to the original plans, details and specifications of the work. Such statements and claims of the plaintiff were audited, examined and passed upon by defendant's chief engineer from time to time, and he issued his certificates therefor from time to time to the plaintiff as the work progressed, showing the amount due the plaintiff therefor and the plaintiff accepted said certificates and statements and presented them for and demanded payment of them, and they were paid in full at the times and in the amounts shown in plaintiff's statement of claim under the caption "Recapitulation," annexed to Exhibit D.

15. Deponent says that the defendant denies that the items shown in Exhibit C. attached to plaintiff's statement of claim contain only those items, the compensation for which is provided for by the classification contained in the contract. On the contrary, defendant says that all work and labor done and materials furnished by plaintiff and sued for in this case was capable of being classified and was agreed to be classified and paid for as in said contract provided, excepting items amounting in the aggregate to about $20,000.00 hereinafter recited, which extra items were included in the final estimate of the chief engineer, hereinbefore referred to, in the sum of

$82,324.03 and excepting such excepted items amounting to about $20,000.00, every item of work or labor done, or materials furnished by defendant to plaintiff and sued for in this case was classified, calculated and the value thereof determined as provided by said contract, and the defendant's chief engineer certified the quantity and value thereof under said contract, and said certificates of the chief engineer and the payments made by the defendant covered and included all work and labor done and materials furnished by plaintiff in the performance of the entire work, except the items above mentioned as excepted, and the deponent says that the plaintiff accepted such estimates of the chief engineer without protest or objection and presented them for payment and demanded and received payment thereof as including all such items for work or labor done or materials furnished up to the dates of the respective certificates.

16. Deponent denies that upon completion of the work and for several months thereafter, plaintiff frequently demanded of said H. T. Douglass and of the said defendant a final estimate of the work done and materials furnished to said defendant, and that the said H. T. Douglass and the defendant failed and refused to deliver said final estimate. On the contrary, deponent says that after the work was completed and accepted by the defendant, the said H. T. Douglass repeatedly requested and demanded of the plaintiff that it should send in to him an itemized statement of all work and labor done and materials furnished on the entire work, which had not then been estimated upon. That finally in September 1903, the plaintiff sent in all of its claims for such items to the said H. T. Douglass and thereupon he audited, examined and certified the same to be of the value of $82,324.03, over and above payments made thereon. This balance includes all estimates of the Chief Engineer of defendant on all items contained in Plaintiff's Exhibit C. and all items in Exhibit D. down to and including item 21, also includes items following where so specified.

17. Wherefore, your deponent says that as to all of the certificates made by its chief engineer up to the said final certificate, that the plaintiff and defendant had settled and agreed thereon, and that plaintiff had demanded their payment and defendant made payment thereof on the faith of such settlement, and that therefore said settlements are as final, binding and conclusive upon the plaintiff as they are upon this defendant, and by said contract they were agreed to be final. Deponent further says that said balance of $82,324.03 was the full and fair value of all the work done and materials furnished by plaintiff in the performance of the entire work, over and above the payments made on it.

18. As to the remaining items of Exhibit D., deponent makes further specific answer as follows:

19. Item 22. Additional charge for excavation and grading between stations 23 and 104 was classified under the contract by defendant's chief engineer as by said agreement it was to be. That the value thereof was estimated by said chief engineer and included

in his estimates given to the plaintiff and were accordingly paid for by defendant.

20. Deponent makes the same answer as to Item No. 23 being for pretended additional charge for excavation and grading between stations 600 and 627.

21. Item No. 24, pretended extra charge for working the earth from the Summit Cut from one end instead of both ends—plaintiff is not entitled to compensation for the reason that the contract required the plaintiff to deposit all earth coming out of excavations at such points along the line of the work as its chief engineer might direct, and if this required any overhaul, the contract provided for compensation for it, and the plaintiff was so paid. Wherefore plaintiff is not entitled to charge anything for this item.

22. Item No. 25, extra charge for concrete masonry and using Portland Cement instead of Natural Cement is not due to the plaintiff, for the reason that the contract provided that the kind of cement to be used was to be of a grade acceptable to the chief engineer of defendant. Plaintiff undertook to use what is called Natural Cement. It was not acceptable to defendant's chief engineer and it was not fit for the purposes used. The work which the plaintiff had done with this Natural Cement in piers, walls and abutments was so weak and crumbly that it did not carry its own weight and was not sufficient to carry the weight of the superstructures to be placed upon it, and the work was condemned by the chief engineer, as by the contract he had a right to do, and the plaintiff thereupon submitted to the chief engineer the Portland Cement for the performance of said work which he accepted and the work was thus made out of Portland Cement. The omission of Masonry in these walls, piers and abutments and the substitution of the entire concrete construction instead of mixed concrete and stone construction was at the request of the plaintiff itself, and was acceptable to the defendant and the change was to the financial advantage of the plaintiff.

23. Item No. 26, concrete masonry buried in fills. This concrete work was part of the work condemned as being unfit for use, and plaintiff buried it itself because it did not pay to take it out, and it was estimated to the plaintiff in the form of fill. Such estimates were accepted by the plaintiff and paid for by the defendant at its request.

24. Item No. 27. All the elements contained in this item were for the substitution of white oak acceptable to the defendant's chief engineer and complying with the contract in place of rails and ties which the plaintiff had supplied and which did not meet the requirements of the contract and were condemned for that reason.

25. Item No. 28 was classified in the contract and its value certified in favor of the plaintiff, and it accepted such certificate and demanded and received payment therefor from the defendant.

26. Item No. 29, additional cost of lumber purchased subsequent to December 1st, 1901—deponent says this cost was not incurred by delay of defendant in furnishing information as to the plans or by reason of change of plans. The price sought to be charged by

the plaintiff for this item is excessive and if the plaintiff was compelled to pay any additional price for this lumber it was because the plaintiff did not promptly purchase the lumber at the time it knew it was required, but delayed purchasing the same until the year 1902.

27. Item No. 30, Lumber delivered and framed for trestles and then not used. To this deponent says that no lumber whatever was ever delivered by the plaintiff and left unused which the defendant did not purchase from the plaintiff at a price agreed on between them after the completion of the work and for which plaintiff has been paid.

28. Item No. 31, for additional trestle work caused by change of plan and use of short pony bents on mud sills in place of bents on masonry. Deponent says this did not increase the cost of work to plaintiff and that the plaintiff consented to make this change and its cost as finally done was estimated by defendant's chief engineer and certified in favor of the plaintiff and plaintiff demanded and received payment therefor from the defendant.

29. Item No. 32, No. 1 white oak ties not of quality alleged to be required by the specifications. Deponent says that plaintiff furnished no ties whatever which were not specified and required by the contract, and that all ties furnished were estimated by the defendant, certified in favor of the plaintiff and paid for by the defendant.

30. Deponent denies all liability for any of the elements contained in Item No. 33. He denies that there were errors compelling changes in the plans for the work. He says that the contract expressly reserved to the defendant the right to change the lines and grades of its work and that no changes were made to the detriment of the plaintiff under the contract. He denies that plaintiff went over its works several times for any other reason or cause, except to make it comply with the contract, when not done properly in the first instance. Wherefore, deponent denies defendant is indebted to the plaintiff for any of the matters contained in this item and avers that the prices are wholly unreasonable and exorbitant, and if allowed, must be classified and paid for at the prices named in the contract.

31. As to Item No. 34 claim for extra cost and expenses required by changes made in the work, deponent says that the only substantial change in the grade, provided in the contract and specifications, was the cut along the Wabash Railroad on the Bigham property increasing the excavation by 68,000 cubic yards, for which the plaintiff was allowed compensation as excavation under the contract by the chief engineer, and received a certificate therefor, and demanded and received payment for such certificate covering this increased excavation. The plaintiff made a gain rather than a loss in the performance of the work by this change, for the reason that the rock it took out in this excavation *were* used by it in making ballast for the railroad, which it was required to furnish under the contract, and for which it was paid as ballast. Wherefore the plaintiff

is not entitled to any additional compensation by reason of this change.

32. Item No. 35 for relining and relaying track from Saw Mill Run to Mine No. 3, deponent says that the contract required this to be laid with No. 1 rails. That the plaintiff requested permission of the defendant to lay down No. 2 rails on this track temporarily so as to expedite and cheapen its own work, which defendant consented to on condition that the plaintiff would as soon as possible and not later than Jan. 1, 1903 take up and remove said second quality of rails and replace the same with rails of the quantity, size, quality and description required by the contract and with the proper splice, frogs, switches, ties, switch machinery, etc., as required by the specifications of the contract and subject to the approval of the Chief Engineer of the West Side Belt Railroad. In relaying this portion of the track, the plaintiff simply complied with its own agreement made at its own request, and of course this involved and necessarily required the relining and re-surfacing of the work. This modification of the contract was also submitted to the guarantors under said original contract and consented to by them.

33. Item No. 36, cost of maintenance of road after Nov. 15, 1902, deponent says that the defendant company did not operate the said road until its final acceptance in June 1903, up to which time the plaintiff was using the road exclusively for its own use in the performance of its work, excepting that it consented to the defendant passing a few cars over its tracks loaded with materials for the construction of its mine plants and for which the plaintiff charged the defendant.

34. Item No. 37, claim for additional ballast in excess of quantity required by specifications, deponent denies that the defendant furnished any additional ballast in the performance of this work. On the contrary he says that the ballast furnished was insufficient and was of a lower grade than that called for by the contract. Wherefore defendant owes plaintiff nothing on this item, and all ballast furnished was paid for in the payments before recited.

35. Item No. 38, additional charge for filling. Deponent denies that there was any additional filling required to be made by plaintiff beyond that necessary to comply with its contract. He says that this additional filling was that which the contract required it to make in order to bring the work up to the surface specified in the contract before it could be required to be accepted as completed, and that it was credited with all the filling it made for the entire work and received payment therefor.

36. As to Item No. 39, extra cost of rails purchased in 1902 over their cost in 1901, deponent says that the delay in the purchasing of these rails was not caused by any act of the defendant. On the contrary, defendant repeatedly asked the plaintiff to order the rails in the year 1901, and repeatedly asked them when and where they were purchased, so that they could inspect them promptly, and plaintiff refused and failed to order its rails in the year 1901 and for reasons of its own, unknown to the defendant, and against defend-

ant's protest, it delayed doing so until the year 1902 to the great detriment and delay in the completion of the work.

37. As to Item No. 40, extra expense for delivering bridge materials at place of work, deponent says that the method of performance of the work was entirely in plaintiff's hands and the manner of delivering materials on the ground was in its control alone. Deponent did nothing to interfere. Deponent further says that the method adopted by the plaintiff in getting its materials to said bridges was cheaper to it than if all of the said materials had been hauled over from the Pittsburgh end of the railroad. He denies, however, that any method of construction was imposed on the plaintiff, or required under the contract between the parties, that being left entirely to the management, control and discretion of the plaintiff itself.

38. Item No. 41 for steel trestle bents under steel bridge at West Liberty Borough, deponent says that the contract calls for these steel trestle bents as furnished. Claim therefor was presented by plaintiff to defendant's chief engineer and by him certified under its contract in its favor and it demanded and received payment therefor.

39. Item No. 42, cost of reloading ties and freight on tie and rails shipped Nov. 29th, 1902, from Bruce Station to Saw Mill Run as per verbal agreement with H. T. Douglass. These items were incurred by the plaintiff having delivered its ties and rails on the wrong end of the Summit Cut for the performance of the work. That this blunder of plaintiff would have caused great delay in the completion of the work for defendant. In order to save such delay, said H. T. Douglass did agree to pay the freight on these items by the B. & O. R. R. Co. so as to carry them around to the proper point of delivery for the performance of the work. They were so shipped and defendant paid such freight and never by itself nor by its chief engineer agreed to pay anything more.

40. Item No. 43 for switch materials and ties, deponent says that the contract of the parties required the placing of switches wherever designated by the chief engineer; that it did not fix or limit the number of them; that switches were placed by plaintiff as directed by the defendant's chief engineer and the value of the work as provided under the contract was certified in favor of the plaintiff and its payment demanded by it and it was paid therefor in full, as by the contract provided.

41. Wherefore, deponent denies that the defendant is indebted to the plaintiff in any sum whatever for any work done by the plaintiff in the performance of the work, whether the value of such work be determined by the terms of the contract or by its fair value in place, excepting the above balance of $82,324.03, as ascertained, determined and certified to by defendant's chief engineer under the contract.

42. Deponent further says that it is true that J. H. McRoberts delivered to the parties the notice marked Exhibit E, attached to plaintiff's statement of claim, whereby he notified the parties that he would hear them as to the claim of the defendant company as to delay

in the completion of the work. It is true that on or about October 24, 1905, said J. H. McRoberts signed and delivered what he called his award under said submission, which consisted of Exhibits F and G attached to plaintiff's statement of claim. Deponent denies that said pretended award by said J. H. McRoberts is binding upon the defendant for the reason that the said McRoberts did not award or find anything on the matter submitted to him as damages to the defendant by the plaintiff's delay in the completion of the work, and he did include and pretended to award upon a large number of other matters not named and included in the submission. Wherefore, the said pretended award is wholly null and void and of no effect upon any party hereto.

43. And further deponent says that said award on its face is only an award as between the plaintiff and A. S. Petrie and is not and does not pretend to be an award as against this defendant, or the other two guarantors under said contract between the plaintiff and A. S. Petrie.

44. And for the further reason that it is a fact and was found by the arbiter in his award that "almost every provision of the agreement between the parties had been disregarded, neglected or violated by both parties and in consequence waived." Wherefore the said award is binding upon this defendant neither as principal nor as guarantor to the said contract, under which said arbiter claimed to make his award.

45. Deponent further says that in the original contract between the plaintiff and A. S. Petrie, plaintiff agreed to perform the whole work covered by the contract for the sum of $388,695.44, and this defendant together with John S. Scully and Theodore Barnsdall guaranteed to pay only that sum of money to the plaintiff, and they say that they have paid more than that sum of money to the plaintiff under said contract. In order that the liability of this defendant and of the said Scully and Barnsdall should not be increased beyond the said sum of $388,695.44 named as the cost of the entire completed work by any act of Petrie, or of the plaintiff, said contract provided that there should be no increase made in the work, or the cost thereof, except upon the written order of the chief engineer of the West Side Belt Railroad Company, and the said plaintiff as subcontractor assented to this agreement and the agreement it made with Petrie as follows:

"The said chief engineer shall have the right to make any alterations that may be hereafter determined upon by him as necessary or desirable in the location, line, grade plan, form or dimensions of the work, either before or after the commencement of the same, defining them in writing, or by or without drawings, and in case such alterations increase the quantities, the said contractor shall be paid for such excess at the contract rate specified. No claim for extra work shall, under any circumstances be made, allowed or considered unless the same shall have been done in pursuance of an order given in writing, as above provided, by the chief engineer, but nothing shall be deemed or stated as extra work which can be

classified, measured and estimated under the terms of this agreement."

46. Deponent says that the defendant's chief engineer did, as provided in the contract, in writing order certain additions to the work covered by the contract and to be done by the plaintiff, but he says that this defendant has paid in full for all such work so ordered and credit- for such payments have been allowed by the plaintiff. Wherefore deponent says that as guarantors of Petrie and as defendant in this case, they have paid in full all sums they undertook to pay to the plaintiff under the above contract.

47. Deponent further says that the contract with the plaintiff provided that the defendant's chief engineer should make current monthly estimates of the quantity and value of the work done by the plaintiff during the preceding month, and that this defendant should pay 85% of the amount of such estimates, all of which has been done. That said contract then further provides:

"When this agreement, in all of its parts and in the manner provided, shall have been completely performed on the part of the contractor, and such performance shall have been accepted and so certified in writing by the said chief engineer, a final estimate of the quantity, character and value of the work done and materials furnished according to the terms of this agreement shall be made by the chief engineer and thereupon, not otherwise sooner, the said railroad company shall within thirty days thereafter pay to the said contractor, upon his giving release under seal to the said railroad company from all claims and demands growing in any manner out of this agreement, all sums of money so certified by the said chief engineer to be then remaining due and unpaid upon the work performed under this agreement, after first deducting therefrom any and all sums herein provided to be retained by the said railroad company; it being expressly understood that such final estimate and certificate of the chief engineer shall be conclusive upon the parties."

Wherefore, deponent says that the final estimate of the defendant's chief engineer made upon the completion and acceptance of the work, showing the balance unpaid the plaintiff by the defendant of $82,324.03 is final and conclusive upon both parties to this action, and that plaintiff cannot recover from the defendant any other sum for any cause whatever growing out of the performance of said work. Deponent annexes hereto as part of this affidavit of defense a true and correct copy of such final certificate of its chief engineer, marked Exhibit A.

48. Deponent further says that this plaintiff brought suit against this defendant and against John S. Scully and Theodore Barnsdall in the U. S. Circuit Court for the Western District of Penn'a at No. 30 May Term, 1906 for the same matters and things herein sued for. In said action this plaintiff claimed the right to recover from this defendant on the same contract as sued for in this case and upon the same award as set up in the statement of claim in this case, to which suit this defendant and the other defendants therein named appeared and answered, and the said case came on for trial

in the said U. S. Circuit Court and thereupon both parties being present and offering testimony showing the respective rights of the parties, the said matter was fully tried, argued and adjudicated in said proceeding in favor of the defendant and against this plaintiff; which final adjudication against the plaintiff for all matters and things claimed, or which it could claim in said action and in favor of this defendant was entered in the said U. S. Circuit Court on the — day of ——, 1906, and upon appeal by the plaintiff from the said adjudication to the U. S. Circuit Court of Appeals at No. 30 May Term, 1906, the said judgment of the lower court against this plaintiff and in favor of this defendant was affirmed by decree entered on the — day of ——, 1907.

49. Wherefore, this deponent says that all matters in controversy in this case and all claims which the plaintiff did, or had the right to present for trial upon its said contract, or upon said award, or otherwise, in the said action in the U. S. Circuit Court at No. 30 May Term, 1907 have been adjudicated against the plaintiff and in favor of this defendant, and it cannot now be heard on re-trial of the same; all of said rights having been finally adjudicated against the plaintiff in the manner hereinbefore recited. Deponent hereby makes the records of the said U. S. Circuit Court and of the said U. S. Circuit Court of Appeals, above referred to, as part of this defense.

50. Deponent further says that the plaintiff did not complete its work at the time named in the contract, nor within a reasonable time for doing same. He avers that the said work was not completed until June 11, 1903, which date exceeded the time for completing the same named in the contract and the reasonable time for completing the same by fifteen months. During all of which time, the defendant was put to the large expense of carrying, without any income or profit to itself, its entire investment in the road, including its rights of way, mining property, stations, corps of engineers, clerks and salaries, as also the sum paid the plaintiff during the construction of the work and was put to the additional expense of paying the plaintiff itself for handling defendant's cars during this fifteen months, at which time it had its own engineers, engines and equipment to do the work lying idle or partially employed for want of such work.

51. Deponent says that this entire delay was the fault of the plaintiff and it claimed and gave no notice of any claim of hindrance or delay by any other person. From such delay the Railroad Company has suffered damages in the following amounts:

Amount paid plaintiff handling defendant's cars over the road		1,787.50
Salary and expenses of engineer corps during 15 months		10,387.55
Engineering department		16,065.05
Rent of offices		3,579.78
Salaries of officers during period of delay		16,005.20
Salary of J. V. Patterson, during same period		1,258.06
Cost of road bed Pittsburgh Construction Company	623,061.66	
Right of way	185,801.24	
Amount of investment carried	808,862.84	
Interest on same 15 months and 11 days		$62,147.74
Total debits due by plaintiff to defendant		$96,970.86
Amount admitted unpaid to plaintiff		82,324.03
Leaving balance due by plaintiff to defendant		$14,646.83

for which defendant asks herein for a certificate against the plaintiff.

B. A. WORTHINGTON.

Sworn to and subscribed before me this 15th day of November, 1907.

[N. S. SEAL.]

HORACE F. BAKER,
Notary Public.

My commission expires January 16th, 1911.

EXHIBIT "A."

Estimate No. —. Final.

West Side Belt Railroad Company to Pittsburgh Construction Co., Contractors.

Final Estimate for Work Done on Sections — and —, Both Inclusive.

Character of work.		Total work done during month.	Total previous estimates.	Total work done to date.	Price per unit.	Amount.
Clearing	acres	.....	21	21	$10.00	$210.00
Grubbing	acres	.....	15	15	10.00	150.00
Excavations	cy.	25695	648553	674248	.38	256,214.24
Rock Faced Ashlar Masonry	cy.	32.9	5915	5882.1	7.00	41,174.70
Broken Range Masonry	cy.	57.8	177	119.2	6.00	715.20
Pedestal Masonry	cy.	155.5	541	685.5	5.00	3,427.50
Concrete Masonry	cy.	120	17940	18046	5.00	90,330.00
Rectangular Culvert Masonry	cy.	220.5	1286	1065.5	3.50	3,729.25
Paving in Cement	cy.	2.	8	10	3.00	30.00
Paving Dry	cy.	11.	67	78	2.00	136.00
Slope Wall	cy.	669.5	1135	465.5	1.75	814.62
Rip Rap	cy.	.....	68	68	1.50	102.00
Trestling	ft. b. m.	40892	2479900	2520792	38.00	95,790.10
Ties	.....	2044	29300	31344	.60	18,806.40
Ballast	cy.	6651	62000	68651	.33	22,654.83
Track laying	lineal feet.	7221	63000	70221	.71	49,856.91
Vitrified Pipe, 30"	lin. ft.	16	390	406	4.00	1,624.00
Vitrified Pipe, 24"	lin. ft.	74	2454	2528	1.00	2,528.00
Vitrified Pipe, 20"	lin. ft.	97	157	254	1.00	254.00
Vitrified Pipe, 18"	lin. ft.	102	952	1054	1.00	1,054.00
Vitrified Pipe, 12"	lin. ft.	336	2042	2378	.75	1,783.50
Vitrified Pipe, 10" & 8"	lin. ft.	38	534	572	.50	286.00

Vitrified Pipe—Lineal ft.—						
Iron Bridging	lineal ft.	15	970	971.5	30.00	29,145.00
French Drain	lineal ft.	.....	920	920.0	.50	460.00
Lowering Gas Pipe					.....	322.05
Extra haul	115469 cy. hauled 100 feet				.01¼	1,443.36
Total estimate						$623,061.66
Less per cent. $10,000 of the balance being advanced						623,061.66
Less amount paid by former estimates						540,737.63
Amount due						82,324.03
Less liquidated damages on account of non-fulfillment of contract						96,970.74
Overpayment on contract						$14,676.71

I hereby certify that the estimate as summarized above is correct.

JAMES H. McROBERTS,
Consulting Engineer.

Approved.
H. T. DOUGLAS,
Chief Engineer.

Approved and payment ordered.
—— ——, *President.*

(Record, page 444.)

In the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania.

No. 398. Fourth Term, 1907.

PITTSBURGH CONSTRUCTION COMPANY
vs.
WEST SIDE BELT RAILROAD COMPANY.

Supplemental Affidavit of Defense to the Statement and Amended Statement of Claim Made by the Receivers of the Defendant Company.

ALLEGHENY COUNTY, *ss:*

Before me personally appears, H. W. McMaster who being duly sworn deposes and says that he is one of the receivers of the West Side Belt Railroad Company, defendant above named, having been appointed such receiver together with F. H. Skelding, by order of the United States Circuit Court for the Western District of Pennsylvania in the suit of The Wabash Railroad Company vs. West Side Belt Railroad Company at No. 7 November Term, 1908; that the affidavit of defence heretofore filed was filed by B. A. Worthington, the vice President of the said company, before the said Company went into the hands of a receiver, and in view of the issues raised by the statement of claim, the said affidavit of defense and the amended statement of claim, affiant has been advised to make this further statement of the defenses which he is advised and believes the defendant company has to this action.

Affiant denies that the plaintiff has filed a concise statement of its demands, accompanied by copies of notes, contracts and book entries, as provided by the Act of 25th May, 1887. On the contrary, this affiant says that it is not possible for him to determine from the statement filed whether the said action is based upon a contract in writing or upon any other book account, memorandum, or written evidence of a debt, or whether the same is based upon a quantum meruit, being an action in assumpsit for the value of materials sold and labor done under an implied contract. Affiant further says that it is not possible for him to determine from the statement of claim for what amount the said suit is brought. The said statement of claim not giving any definite amount for which the plaintiff's claim is made, but mentioning in the course of said statement two different amounts, one being the amount of an award made under an alleged arbitration, Three hundred thirty-two thousand seven hundred fifty dollars and ninety-eight cents ($332,750.98), and the other amount, stated at the end of certain exhibits under the term, "Recapitulation", being Four hundred twenty-one thousand four hundred fifty-three dollars and forty-two cents ($421,453.42), affiant is left in ignorance as to the character of the claim and the amount thereof which plaintiff makes in this case.

Further answering the said claim affiant says: That if in the statement of claim and amended statement of claim, so as aforesaid filed in this case, the plaintiff claims upon contracts with the defendant company and with A. S. Petrie, attached to the statement of claim, the said defendant company has a full, just and legal defense to all of said claim in this, that the said contract of the plaintiff company with A. S. Petrie, upon which the defendant company, the West Side Belt Railroad Company, and others, are guarantors, has already been sued upon by the said plaintiff against the said Railroad Company and the other said guarantors in the United States Circuit Court for the Western District of Pennsylvania at No. 30 May Term, 1906, and that said cause was so proceeded in that judgment was rendered therein for the defendant in the said cause in the Circuit Court of the United States upon the 13th day of February, 1907, and subsequently thereto, upon writ of error to the Circuit Court of Appeals at No. — March Term, 1907, the said judgment was thereupon affirmed; that the said judgment is the final and conclusive judgment between the parties and that said cause of action is the same cause of action as that sued upon in the present case, and the parties thereto are the same parties, except that in this action said plaintiff has not joined T. S. Barnsdall and John S. Scully, the other guarantors. That affiant is advised, believes and therefore avers, that the said judgment is a complete and full bar to any further or other proceedings, actions, claims or demands of the said plaintiff upon the said contract against this defendant in any court or jurisdiction whatsoever. That in so far as said plaintiff may claim upon a quantum meruit for the value of work done and material furnished under an implied contract between the said plaintiff and the West Side Belt Railroad Company, this affiant says that the said company has a full, complete and legal defense to all of said plaintiff's claim for the following reasons:

There is no implied contract upon which said quantum meruit or action in assumpsit can be maintained, for the reason that the plaintiff's statement of claim shows attached thereto and made part thereof a certain contract of the West Side Belt Railroad Company, defendant, with one A. S. Petrie for the doing of all the work and the furnishing of all the material and labor for which the plaintiff now brings suit. The said statement also shows a contract of the said plaintiff company with A. S. Petrie exactly and in terms the same, except that the consideration is different in amount and in character than that in the contract between the defendant company and Petrie. That the said plaintiff company was, therefore, a sub-contractor, its contractual relationship being solely and altogether with A. S. Petrie. That the said contractual relation between the said Petrie and the said plaintiff company was separate and independent of the other contract made between the defendant company and the said Petrie. That, as appears by the statement of claim, all the work done and material furnished by the said plaintiff company was done for the said Petrie and under and by virtue of the terms of the contract with him; that any liability therefor upon a quantum meruit would be from the said Petrie to the said plaintiff company, and any

liability of this defendant company would be to the said A. S. Petrie. What the relations of the said A. S. Petrie were with the plaintiff company, and how he disposed of the consideration received for said contract, are matters not known to this affiant and, as he submits, not material to the present case. Affiant is advised, believes and therefore avers, that before any action upon a quantum meruit or upon an implied contract can be maintained, there must be a contractual relation, either express or implied, upon which the said material is furnished or the labor done; that there is not only no such contractual relation here, but the agreements filed as part of the plaintiff's statement of claim show that the contractual relation was, as aforesaid, between the plaintiff and A. S. Petrie.

Further answering the said plaintiff's claim, assuming same to be based upon a quantum meruit or implied contract, affiant says that he is informed and believes, and therefore avers that the said labor done and material furnished was not fairly and reasonably worth the prices charged therefor, but the prices charged therefor in the plaintiff's statement of claim are excessive and beyond the market prices at the time for the said work and materials alleged to have been done and furnished; and this affiant begs to refer in this connection more particularly to the affidavit of defense filed in this case by the West Side Belt Railroad Company for particular matters of defense entering into the manner in which said different items were furnished and settlement therefor made.

Affiant further denies that the materials furnished and the work and labor done and performed, as claimed by the plaintiff, were done and performed for the defendant company at its instance and request, or upon any promise or engagement of any sort or description whatsoever, and further denies that the statement of values set out in the statement of claim, and their prices shown and charged therefor in Exhibit C and D attached to plaintiff's claim, are fair and reasonable prices for the materials furnished and work and labor done.

Affiant further says that he is advised and believes, and therefore avers, that upon a true and just settlement between the plaintiff and the defendant company, the plaintiff is indebted to the defendant company over and above the just and fair price of all work done and materials furnished by reason of the damages caused by the delay of the said plaintiff company in constructing the road-bed of the defendant company, and by reason of the other matters as more fully set forth in the affidavit of defense heretofore filed by the Railroad Company, defendant, in the sum of Fourteen thousand six hundred forty-six dollars and eighty-three cents ($14,646.83).

Further answering the amended statement of claim affiant says that the same defenses heretofore made to the original contracts apply to the said contract attached to the amended statement of claim, as set forth therein, and to which affiant begs leave to refer for the sake of brevity without repeating the same in length, and in like manner to the same defenses as to any quantum meruit or action in assumpsit upon a contract implied, as heretofore set forth. And further answering the same affiant says that the contract does not

show any right to charge any sum for the use of said substituted rails whatsoever, but the permission to change said rails was given at the instance and request of the said plaintiff company and for its accommodation and convenience, and that there is no liability upon the defendant company on the face of said contracts to pay the said plaintiff company any amount whatever for permitting said change to be made.

Wherefore affiant claims of the said plaintiff the sum of Fourteen thousand six hundred forty-six dollars and eighty-three cents ($14,646.83) and asks that a balance be certified in favor of the said West Side Belt Railroad Company, defendant, for that amount; all of the averments herein being made upon affiant's information and belief, and as he verily expects to be able to prove upon the trial of this case.

Affiant further says that he makes this affidavit on behalf of himself and his co-receiver in this case.

H. W. McMASTER.

Sworn to and subscribed before me this 4th day of February, 1909.

[N. P. SEAL.] HORACE F. BAKER,
Notary Public.

My commission expires January 16, 1911.

[Endorsed:] Copy. No. 398. Fourth Term, 1907. Pittsburgh Construction Company vs. West Side Belt Railroad Company. Supplemental affidavit of defense to the statement and amended statement of claim made by the receivers of the defendant company. Order of Court: And now, Feb. 6, 1909, on motion of attorneys for the defendant and defendant's receivers, leave is hereby granted to file the within supplemental affidavit of defense. By the Court. Patterson, Sterrett & Acheson, Attorneys at Law, 1759 Frick Annex, Pittsburgh.

(Record, page 181.)

By Mr. PATTERSON: Counsel for defendant offer in evidence the record of this case as the same is printed in the case (it being a writ of error) Exhibit 19, of the Pittsburgh Construction Company vs. The West Side Belt Railroad Company, the judgment of the Court below being given at No. 30 May Term, 1906, and the number of the *the* case in the Circuit Court of Appeals being No. —, March Term, 1907, the title of the case being: "Pittsburgh Construction Company, a corporation and citizen of the State of West Virginia, vs. West Side Belt Railroad Company, a corporation and citizen of the state of Pennsylvania, John S. Scully and Theodore N. Barnsdall, citizens of the State of Pennsylvania," and particularly call attention to the judgment that is entered in the Court below at No. 30 May Term, 1906, to-wit: "Judgment will therefore be entered in favor of the defendant non obstante veredicto, but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed; and any judgment for the defendant notwith-

standing the verdict in favor of the plaintiff for the above mentioned sum."

By Mr. PATTERSON: I understand it to be agreed by counsel for the plaintiff that this printed record be accepted without special exemplification under the Act of Congress.

The above offer is made, together with the opinion of the United States Circuit Court of Appeals in the said case and judgment thereon, as follows: For the reasons stated the judgment non obstante veredicto entered by the Circuit Court is affirmed." The same being contained in the papers Exhibits 19 and 19½, in accordance with the averments of the affidavit and supplementary affidavit of defense.

By Mr. MCCLAY: This offer is objected to for the following reasons:

First. The record proposed to be offered does not show that the adjudication was upon the merits of the case now before the court, but, on the other hand, shows that it was not upon the merits.

Second. The controversy at No. 30 May Term, 1906, was not between the parties who are now parties in this action, as appears from this record.

Third. The sole question upon which Judge Buffington decided the case, was, as it appears from the record thereof, upon the right of the plaintiff to sue, the plaintiff, the Pittsburgh Construction Company, being a corporation at the time of the execution of the contract of May 24th, 1901, and the registration having been made June the 15th, 1901, and the opinion of Judge Holland, of the Circuit Court of Appeals for the Third Circuit, affirming that judgment, expressly decides the case upon that ground, that part of his opinion relating thereto being as follows:

"There were eight matters of defense set up by the defendant at the trial of the case in the Circuit Court, none of which was considered by the learned judge upon the motion for judgment non obstante veredicto, except the first, to wit: The contract is void because it was executed before the Pittsburgh Construction Company, a foreign corporation, was registered in Pennsylvania."

Fourth. The action upon which suit is brought in this case is not the same cause of action upon which suit was maintained in the case, the record of which is now proposed to be offered in evidence.

Fifth. This suit having been brought since May 23rd, 1907, and the plaintiff having complied with all of the terms of that act, it is entitled to maintain this suit.

And, generally, as incompetent and irrelevant.

By the COURT: Objection overruled.

To which ruling of the Court counsel for the defendant excepted.

Exception allowed and bill sealed.

By Mr. MCCLAY: So far as the writings made on April 20th, 1901, and May 24th, 1901, purporting to be contracts between the West Side Belt Railroad Company and A. S. Petrie, and A. S. Petrie and the Pittsburgh Construction Company, attached to our statement of claim, Exhibits A and B, are concerned, they are identical with those offered in this case and the award is the same; and that the

West Side Belt Railroad Company is the same railroad company that was sued in the United States Court; and the Pittsburgh Construction Company is the same company that was plaintiff in that suit.

(Record, page 573.)

Opinion.

BUFFINGTON, *J.*:

This is an action of assumpsit brought by the Pittsburgh Construction Company, a corporation of the State of West Virginia, against the West Side Belt Railroad Company, a corporation of Pennsylvania, designated in this opinion as "the Belt Road" and John S. Scully and Theodore N. Barnsdall, citizens of the said State.

The Belt Road Company on April 17th, 1901, entered into a written contract with A. S. Petrie to construct its proposed line of railway. On April 25th, 1901, it authorized Petrie to sublet this contract to the plaintiff company, which company was chartered in West Virginia, May 14th, 1901. On May 24th, 1901, Petrie made a new contract with the plaintiff company, *which company was chartered in West Virginia May 14th, 1901. On May 24th, 1901, Petrie made a new contract with the plaintiff* (which was substantially a duplicate of this contract), a copy of which first contract is embodied in the statement of claim as "Exhibit A." Contemporaneously with the execution thereof it is, by endorsements thereon, stipulated "For value received The West Side Belt Railroad Company and John S. Scully and T. N. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in the within contract as the same becomes due and payable. In witness whereof, the said West Side Belt Railroad Company has hereunto set the common and corporate seal by the hand of its President attested by its Secretary. And the said John S. Scully and T. N. Barnsdall have hereunto set their hands and seals this 24th day of May, 1901." Thereafter the plaintiff proceeded under said contract, and about June '03 turned over the road to the Belt Road in pursuance of the following notice: "In reply to your letter of June 11th, will say that we will accept the work as completed. We do not intend to make any reduction for imperfect ditching. We do not, however, mean by this acceptance of the work to waive any claim we may have for damages resulting from any violation of the contract with you. We, therefore, ask you to remove at once all your engines, plant and equipment from the railroad tracks as they greatly interfere with the operation of the road. And we further notify you that any movement of your trains or engines on our tracks from this date, must be with the consent and under the directions of our Superintendent, Mr. C. V. Wood; otherwise we will hold you liable to any damages resulting from any interruption or delay to our traffic." Petrie, who made the original contract, was not a contractor. It was never intended he should complete the road, or was the contract given to him for that purpose. He was an officer of the Belt Road, who resigned to qualify him to take the contract and become the conduit

through whom the contract could be sublet to the plaintiff company, and through whom a portion of the proposed price of the construction was, through the agency of Barnsdall and Scully, to be returned to all the stockholders of the Belt Road. The contract of Petrie with the plaintiff seems, therefore, to have been treated as between plaintiff and the Belt Road. After the construction of the Belt Road, its Chief Engineer sent the following notice to the plaintiff: "I have about completed the final estimate of your work under your contract with the West Side Belt Railroad Company, and as Chief Engineer mentioned in the contract to whom has been committed the final decision of all disputes between the parties, before finally submitting the estimate to you, I wish to notify you that the Railroad Company claims of me the deduction or credit of the final estimate of the damages sustained by the Railroad Company owing to the delay in the completion of the contract. If you wish to be heard on this question, I will meet your representatives and the representatives of the railroad company at my office in the Farmers Bank Building, on Monday, September 21st, at ten o'clock A. M.; or if this may be inconvenient to you, upon your suggestion, I will try and fix a date and place that will suit your convenience. Please let me know what your wishes are in the matter." Under this notice, a large amount of testimony was taken, the Belt Road and the plaintiff being each represented by counsel. Later, notice was given to Scully & Barnsdall by the following notice: "To A. S. Petrie, Pittsburgh, Construction Company, West Side Belt Railroad Company, John S. Scully, T. N. Barnsdall, J. C. Boyer, McCleave & Wendt and Reed, Smith, Shaw & Beal: You are hereby notified that, upon Monday, January 16th, 1905, at ten o'clock A. M., at my office, Room 2107 Farmers Bank Building, Pittsburgh, Pa., I will hold a final meeting under the provisions of the clause of the Article- of Agreement dated 24th day of May, 1901, between the Pittsburgh Construction Company, of the first part, and A. S. Petrie, of the second part, which clause reads as follows: 'It is mutually agreed and distinctly understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relating to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law, or otherwise by virtue of said covenants, so that the decision of the said parties *do* hereby waive any right of action, suit or suits, or other remedy in law or otherwise by virtue of said covenants, so that the decision of the said chief engineer, James H. McRoberts shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.' You are requested to be present at this meeting if you see fit." There is a dispute as to whether Scully and Barnsdall took any part in the proceedings. There is no question, however, they had notice, and that counsel for them requested an opportunity to examine the testimony, and thereafter made no request for further hearing, and made no protest. On October 24th, 1905, McRoberts made a report of an award in which "he finds the bills and claims of the Pittsburgh Con-

struction Company, sub-contractors, to amount to $972,112.25, itemized as follows:

Final estimate	610,321.65
Force and extra work	361,790.60
	$972,112.25

Of this account as rendered your arbiter has rejected $98,623.64 as excessive, irrelevant and unjust, leaving $873,488.61 in favor of the sub-contractor. Of this amount your arbiter finds $540,737.63 as having been paid by the West Side Belt Railroad Company on account, as surety for Petrie, the Contractor, leaving as against Petrie $322,750.98 which will become due and payable as of this date.

This suit is brought against Petrie's guarantors to recover said sum of $322,750.98, and verdict for such amount with interest was taken for the plaintiff; thereupon, defendants move for judgment in their favor non obstante veredicto. The grounds of this motion are: First, That this suit cannot be maintained because the plaintiff, a foreign corporation, did not register as required by Pennsylvania statute, before making the contract on which this suit is based. Secondly, That the alleged award is invalid because the arbiter failed to pass a report on the claim of the railroad for $96,970.86, for delay in completing the work. Lastly, The arbiter having found that "almost every provision of the agreement between the parties had been disregarded, neglected or violated by both parties and in consequence waived," the sureties are released. Taking up the first question, it is proper to defendants to say that while they deny liability under the contract by reason of plaintiff's non-registration, they do not deny that in a proper proceeding that the railroad company, which is financially responsible is answerable for just compensation to the plaintiff. In that regard their brief says: "Where work is done under such a contract, recovery can be had on the quantum meruit, and not on the contract." Turning first to the statutes, we have the Acts of 1874, which provides: "From and after the passage of this Act, no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices, and appointed an agent or agents, for the transaction of its business therein. It shall not be lawful for any such corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth, a statement under the seal of said corporation, signed by the President and Secretary thereof, showing the title & object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein, and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every such office; and any person or persons, agent, officer, employee of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this Act being

complied with, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment not exceeding thirty days, or by a fine not exceeding One thousand dollars, or either, at the discretion of the court hearing the same." Also the 19th section of the Act of 1889, P. L. 420, which provides: "That hereafter any limited partnership, bank, joint stock association, association or company whatsoever, formed, erected, incorporated or organized, by or under any law of this Commonwealth, general or special, or formed, erected, incorporated, or organized, under the laws of any other state, and doing business in this Commonwealth, shall not go into operation without first having the name of the institution or company, the date of the incorporation or organization, the act of assembly or authority under which form, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the Auditor General, and every limited partnership, bank association, join- stock association, company or corporation whatsoever, now engaged in business in this Commonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the Auditor General; all the corporations, companies, associations and limited partnerships aforesaid, shall annually hereafter notify the Auditor General of any change in their offices; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer in the same manner as taxes on capital stock are settled and collected." The contract here involved between Petrie and the plaintiff was made May 24th, 1901. The plaintiff had not been registered. It subsequently did register on June 15th, 1901. Permission to a foreign corporation to transact business in a state is subject to state legislation, when exercised within reasonable limits, and where the highest courts of the state have *constructed* the statutes granting such permission. The Federal Courts follow such construction: McCanna & Company vs. Citizens Company, 76 Fed. Rep. 420. Now, in Lasher vs. Stimson, 145 Pa. St. 30, in speaking of the requirements of registration of the Act of 1874, the Supreme Court held: "These terms are not onerous or in conflict with any constitutional provision or rule of public policy. But they are clearly prohibitory, and they indelibly stamp as unlawful any business transaction within the state by a foreign corporation which has not complied with them. It is not only by its observance of them that it can have a legal existence for business purposes within the jurisdiction or acquire contractual rights which our courts will recognize."

This decision was made in 1891, and was declared law of the state when the contract between Petrie and the plaintiff was made in 1901. The decision in Delaware, etc. Company vs. Passenger Railway Company, 240 Pa. St. 25, follows in 1902. This decision shows adherence by the Supreme Court to the construction originally given

the act in Lasher v. Stimson. "The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, and to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other *corporation* of the act would violate its plain words, and wholly defeat its object by affording protection to the corporation and denying it to the public." On May 24th, 1901, when the plaintiff, a foreign corporation made this contract, it had not been registered. It therefore had no right under the statutes to make it, and in doing so its officers and agents made themselves liable to a criminal prosecution with fine and imprisonment. It will also be observed that the purpose of the contract was to bind the corporation to do a large amount of unlawful work in the Commonwealth. A contract thus made in violation of law and whose purpose was to procure further violations of law will not be enforced by the courts. In Johnson v. Hulings, 103 Pa. St. 501, plaintiff had sold land and pursuant to contract was entitled to $10,000 commission. This the jury awarded him. He had not taken out a broker's license. The Supreme Court said: "Such being the case, the plaintiff was, by virtue of the 18th section of the Act of April 10th, 1849, brought within the provisions of the act of May 27th, 1841, and was subject to the penalty therein described in case of a violation of these provisions. The result follows that Johnson in the transaction in hand stands in the position of a real estate broker who seeks to enforce a contract which under the statute he had no right to make, and by the making of which he subjected himself to the penalty imposed by that statute. But a contract such as this opposed as it is alike to good morals and public policy, cannot be enforced. That has been ruled times without number. If the business itself be unlawful, the commissions or gains arising from it without regard to the form of contract for their payment are also unlawful." If, then, the contract between Petrie and the plaintiff was illegal, and intended to secure the performance by the plaintiff of unlawful acts, how can this action on the guarantee given by the defendants be enforced? That guarantee was an undertaking on their part to pay the plaintiff a consideration for doing the unlawful thing provided in the contract. It is clear that an action on the guarantee cannot be sustained without disclosing the guaranteed contract or performance of its prohibited acts are the foundation of a recovery against the guarantors. Now, "the test, whether a demand connected with an illegal transaction, can be enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case." Johnson v. Hulings, Supra. This is in accord with McMullen vs. Hoffman, 174 U. S. 654, where it is said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is neces-

sary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will then enforce any alleged rights directly springing from such contract." This objection of the invalidity and illegality may sound very ill, coming from a party who on his part enjoyed the fruit of the contract, but as it is said in Thorn v. Travelers Insurance Company, 80 Pa. St. 29: "It is not for his sake the objection is allowed. It is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral or an illegal act." To the same effect is held in this court in Pittsburgh Dredging Co. vs. Monongahela Company, 139 Fed. Rep. 730, where it is said: "It will be observed that, when the law refuses to be used to enforce an unlawful contract, it is not done to benefit or aid the party who has profited by the wrong and who is in possession of the fruits of the fraud, but on the higher ground of public policy." We are clear also that the subsequent work under the contract, the estimate made by the engineer at the suggestion of the railroad and the arbitration would not change the status of the contract. Once tainted with the illegality there can be no cure so far as the contract is concerned. Such is the holding in Coppell vs. Hall, 7 Wallace 558: "In such case there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbid and denounced. The maxim ex dolo malo non oritur actio is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Nor does the award of the engineer have any efficacy in this case. Authority on his part to act, and the obligation of parties to abide by his decision, rests in both cases on the provisions of the contract which is contra legem. The law will not enforce an award which is on an illegal contract: Benton v. Singleton, 114 Ala. 556.

Upon the whole, therefore, we are of opinion that by reason of the non-registration of the plaintiff corporation prior to the contract here involved, the verdict for plaintiff cannot be sustained. Judgment will therefore be entered in favor of the defendant non obstante veredicto, but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed.

[Endorsed:] No. 30. May Term, 1906. Sur motion for judgment non obstante verdicto. Pittsburgh Construction Company vs. West Side Belt Railroad Company et al. Opinion. Buffington, J. Filed February 13th, 1907.

(Record, page 587.)

(Copy.)

EXHIBIT No 19½.

United States Circuit Court of Appeals.

No. —.

PITTSBURGH CONSTRUCTION COMPANY
vs.
WEST SIDE BELT RAILROAD COMPANY et al.

Opinion.

HOLLAND, *District Judge:*

The Pittsburgh Construction Company, the plaintiff in error, brought this action against the West Side Belt Railroad Company and John S. Scully and Theodore N. Barnsdall, the defendants in error, to recover the sum of $332,750.98 upon an award of James H. McRoberts, chief engineer of the West Side Belt Railroad Company, sitting as arbiter.

The West Side Belt Railroad Company (hereinafter called the "Belt Road") was a corporation organized under the laws of the State of Pennsylvania for the construction and operation of a road from Pittsburgh to Bruce Station on the Baltimore & Ohio Railroad, a distance of about twelve miles. John S. Scully was the president and Theodore N. Barnsdall was one of the directors. On April 17th, 1901, A. S. Petrie, the secretary, resigned his office to enable him to contract with the company to build the twelve miles of railroad for which it was organized, and on the 25th day of April, 1901, executed a contract with the Belt Road for that purpose, and about the same time obtained permission to sub-let the work to the Pittsburgh Construction Company, a corporation organized under the laws of the State of West Virginia, for which Letters Patent were issued to it on April 14th, 1901. The contract between Petrie and the Construction Company was dated May 24th, 1901, and was identical in terms with his agreement with the Belt Road. The consideration was to be $388,695.44, subject to such alterations and additions as were provided for under the terms of the contract, of which and the cost of which James H. McRoberts was made the final arbiter. For the payment of all moneys to become due under this contract the defendants in error became surety by writing duly executed, of which the following is a copy:

"For value received, the West Side Belt Railroad Company and John S. Scully and W. T. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in the within contract as the same becomes due and payable."

In Witness Whereof, the said West Side Belt Railroad Company

has hereunto set its common corporate seal, by the hand of its President, attested by its Secretary, and the said John S. Scully and T. N. Barnsdall have hereunto set their hands and seals this 24th day of May, A. D. 1901."

The case was tried before a jury and a verdict in favor of the plaintiff for the amount of the award. Motion and reasons for a new trial were filed by the defendants, as well as a motion for judgment *non obstante veredicto*. The trial Judge in a carefully considered opinion (Pittsburgh Construction Co. vs. West Side Belt R. Co., et al., (C. C.) 151 Fed. 125) entered judgment for the defendants notwithstanding the verdict because the plaintiff being a foreign corporation, had failed to register in Pennsylvania prior to the execution of the contract upon which the award was made in accordance with the provisions of the Act of Assembly, approved April 22nd, 1874, P. L. 108. To this action of the circuit court, a writ of error was sued out and the assignments of error in this court were as follows:

"First. The learned Court erred in entering judgment in favor of the defendants *non obstante veredicto*, upon the motion of the defendants, which is as follows:

'And now, June 12th, 1906, the defendants move the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.'

"Second. The learned Court erred in not entering judgment in favor of the plaintiff upon the verdict."

There were eight matters of defense set up by the defendants at the trial of the case in the Circuit Court, none of which was considered by the learned judge on the motion for judgment *non obstante veredicto*, excepting the first, to wit: "The contract is void because it was executed before the Pittsburgh Construction Company, a foreign corporation was registered in Pennsylvania." As we are of the opinion that the judgment was properly entered in the Circuit Court, it will be unnecessary to consider any of the other matters of defense here. The contract under which the road was built and the work done was executed on May 24th, 1901, and the Construction Company registered at Harrisburg, Pennsylvania, with its office in Pittsburgh, Pennsylvania, on the 15th day of June, 1901. The act of General Assembly of Pennsylvania, the provisions of which it is claimed were violated by the Construction Company in this case, is the Act of April 22d, 1874, (P. L. 108,) passed to carry into effect Article 16, Section 5, of the Constitution of Pennsylvania, which provides that "no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served." The first paragraph of this Act of 1874 declares that "from and after the passage of this Act no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein." This paragraph prevents a foreign corporation doing business in this state before it establishes and appoints an

agent therein; but the second paragraph in the Act goes further, and enacts:

"It shall not be lawful for any such corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation, and signed by the President or Secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein and the certificate of the Secretary of the Commonwealth under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every of such offices."

The second paragraph declares unlawful the doing of any business by a foreign corporation not complying with the terms of the Act. The third paragraph makes the transaction of such business a positive crime, punishable with fine and imprisonment:

"Any person or persons, agent, officer or employé of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

It is clearly shown by documentary evidence that the Construction Company entered into the contract upon which it declares, and through which it desires to recover before registering in this State, in accordance with the Act of 1874. Had this Act expressly declared void contracts made by a foreign corporation not complying with the usual requirements, there would be no room for any contention by the plaintiff that it could recover in this case, as the Supreme Court has held in the case of Diamond Glue Co. vs. United States Glue Company, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328, that where the state act declares void all contracts made by foreign corporations not observing the required formality, a recovery cannot be had upon the contract. The Pennsylvania Act in question does not in terms declare the contract void. It does, however, declare in the first paragraph that "no foreign corporation shall do business in this Commonwealth until such corporation shall have established an office," &c.; and in the second paragraph that "it shall not be lawful for any such corporation to do any business in the Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement * * * showing the title and object, * * * the location of its business, and the name or names, of its authorized agent," &c.; and the third paragraph makes any violation of these provisions a misdemeanor punishable by fine and imprisonment. Do these provisions of this Act of 1874 then render void all contracts made by foreign corporations without having first registered as required? The weight of authority is to the effect that it is not absolutely necessary in order to make such contracts void that the legislature should, in express terms, declare them so. The rule in this regard has been clearly and

aptly expressed by Lord Chief Justice Hold in Bartlett vs. Vinor, Carthew 253, as follows:

"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

The rule thus stated has been generally followed by the courts, and especially by the Supreme Court of Pennsylvania in a number of cases: Mitchell vs. Smith, 1 Bin. (Pa.) 110; 2 Am. Dec. 417; Badgeley vs. Beale, 3 Watts (Pa.) 263; Columbia Bank & Bridge Co. vs. Haldeman, 7 Watts & S. 233; 42 Am. Dec. 229; Johnson vs. Hulings, 103 Pa. 501; 49 Am. Rep. 131; Thorn vs. Travelers' Insurance Co. 80 Pa. 29, 21 Am. Rep. 89. In Johnson vs. Hulings, supra, the plaintiff was in the identical situation with the Construction Co. in the case at bar. In both, the contract would have been entirely lawful and legitimate but for the failure on the part of the complainant to comply with the statutory requirements. In Johnson vs. Hulings, supra, the complainant engaged to sell, or did sell, land upon which he was entitled to commissions of $10,000.00 had *been* previously complied with the Pennsylvania Act of April 14, 1849, requiring him to take out a broker's license. His failure to do so was held to be a bar to a recovery for the commissions, because the Act with which he failed to comply prescribed a penalty, and in this case the Construction Co. is guilty of the same default in not having complied with the Act requiring registration before entering into the contract upon which the award is made. This Act is a salutary one for the protection of persons transacting business with foreign corporations. The facility with which irresponsible corporations are created, frequently with no assets within the jurisdiction where business is transacted, would frequently leave creditors without any chance whatever of collecting their claims were it not for acts requiring registration where business is transacted. This enables the creditors to bring the foreign corporation within the jurisdiction of the courts where the obligations are created; and, in order that the provisions of these laws may be complied with, it is necessary that they should receive a reasonably strict enforcement. Conscious of the importance of requiring foreign corporations to comply with these requirements of the Act, the courts have uniformly insisted upon registration before beginning business in a foreign jurisdiction. The Act of 1874 has been passed upon by the Supreme Court of Pennsylvania, and the federal courts will follow such constructions. McCanna & Co. vs. Citizens Co., 76 Fed. 420, 24 C. C. A. 11, 35 L. R. A. 236. The point in this case was not squarely decided by the Supreme Court of Pennsylvania until 1902, about one year after the execution of the contract, but prior thereto cases involving a similar principle had been passed upon in Johnson vs. Hulings, 103 Pa. 501, 49 Am. Rep. 131; Thorn vs. Travelers' Insurance Co. 80 Pa. 29; 21 Am. Rep. 89; Lasher vs. Stimson, 145 Pa. 30, 23 Atl. 552. In the case of Delaware &c. Co. vs. Passenger

Railway Co., 204 Pa. 25, 53 Atl. 533, the Supreme Court following the rule indicated in Lasher vs. Stimson, supra, said:

"The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object by affording protection to the corporation and denying it to the public."

The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the plaintiff must rely upon its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends upon whether it requires the aid of an illegal transaction to establish the case, and, if it be necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights springing from such agreements. Johnson vs. Hulings, supra; McMullen vs. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117.

For the reasons stated, the judgment non obstante veredicto entered by the Circuit Court is affirmed.

(Record, page 455.)

In the Court of Common Pleas No. Four of Allegheny County, Pennsylvania.

No. 398, Fourth Term, 1907.

PITTSBURGH CONSTRUCTION COMPANY, a Corporation,
vs.
WEST SIDE BELT RAILROAD COMPANY, a Corporation.

Motion for Judgment Non Obstante Veredicto.

Opinion.

SWEARINGEN, *P. J.:*

At the close of the trial of this case, the jury was directed to render a verdict for the plaintiff. A motion was then made for the entry of judgment non obstante veredicto. This of course entails upon us the duty of stating the facts and discussing the law arising therefrom.

The defendant is a railroad corporation duly organized under the laws of Pennsylvania. In 1901, John S. Scully was president and A. S. Petrie was Secretary of said corporation, and James H. Mc-

Roberts was Chief Engineer. The plaintiff is a corporation under the laws of West Virginia. It was duly registered in Pennsylvania, on June 15th, 1901, which was twenty-two days after the contract in controversy was signed.

Early in the year 1901, the defendant undertook the building of a single track extension of its railroad in Allegheny County, Pennsylvania, being about twelve miles in length, which was to connect its railroad at Banksville Junction with the Baltimore and Ohio Railroad, near Bruce Station, and thus reach certain coal lands of parties who were interested in the defendant corporation. For this purpose, the defendant caused plans and specifications to be made and sent out invitations for bids. Accompanying these invitations was an estimate, showing in detail the quantities of work to be done. Henry J. Werneberg bid $398,943.36 for this work, which was accepted by the defendant. Following this, on April 17th, 1901, the Secretary of the defendant corporation, A. S. Petrie, made a written proposition to construct the said extension of defendant's railroad for the sum of $400,000.00 in cash and $400,000.00 in the bonds of the corporation. This proposition was approved by the Executive Committee of the Board of Directors. On the same day, the Board of Directors met and Mr. Petrie presented his resignation as Secretary, which was accepted, and J. C. McKown was elected to succeed him. At the same meeting, the action of the Executive Committee was adopted and the contract with Petrie was authorized. The Board also authorized the issue of the balance of the stock, to wit: 8,000 shares. Likewise, at the same meeting of the Board, Mr. Petrie presented a written request that the $400,000.00 in cash be advanced to him and that the said bonds remain with the Treasurer "for the faithful performance of the contract"; and this was ordered. At a subsequent meeting, April 22nd, 1901, the Trustee of the Mortgage Bondholders was directed to deliver the said bonds to the Treasurer of the defendant corporation. At a meeting of the Board, on April 25th, 1901, the form of contract with Petrie was approved and the proper officers of the corporation were directed to execute the same. At this meeting, Mr. Petrie presented a written request for permission to sublet the whole of his said contract to the Pittsburgh Construction Company, the plaintiff. It was then ordered that this permission be given. At the same meeting, a contract was made between said Petrie and the defendant, whereby the latter agreed to guarantee the payments to the Pittsburgh Construction Company, the Contractor, as the same became due and payable. And on the same day, an agreement was made between said Petrie, T. N. Barnsdall and said John S. Scully, whereby said Petrie turned over to Barnsdall and Scully the $400,000.00 in cash, which Petrie had received from the defendant, and the bonds, and Barnsdall and Scully in turn agreed to undertake the sale of said bonds and to apply the proceeds on the contract taken by the Pittsburgh Construction Company, the plaintiff; and further, upon completion of the road, to distribute to the stockholders of the defendant (they and Petrie being of them) "in proportion to their present holdings of the stock of said company, the $400,000.00 of stock received by

said T. N. Barnsdall and John S. Scully on their recent subscription of stock." And thus it was made to appear that this stock had been fully paid. It is distinctly averred in the Statement of Demand, and it is not directly denied, that this $400,000.00 in cash was never actually paid by the defendant, but that instead the 8,000 shares of stock, par value $400,000.00 were delivered to Barnsdall and Scully and distributed as aforesaid. On the same day, April 25th, 1901, the contract between A. S. Petrie and the defendant was formally executed in accordance with the foregoing authority. A copy of this contract is attached to the plaintiff's Statement of Demand, marked Exhibit "A."

Subsequently, the said Henry J. Werneberg and his associates, obtained a charter for the Pittsburgh Construction Company, the plaintiff, which was granted by the proper officers of the State of West Virginia, on May 14th, 1901. The corporation was duly registered in the office of the Secretary of the Commonwealth of Pennsylvania, on June 15th, 1901. It has established a known place of business, designated an agent, paid all taxes which would have accrued, had it registered on May 14th, 1901, and has complied with all the laws of Pennsylvania, relative to doing business therein.

Subsequent to its incorporation, but prior to its registration, to wit: on May 20th, 1901, the plaintiff began the work of constructing the said extension of defendant's railroad. And on May 24th, 1901, the plaintiff entered into the formal contract with A. S. Petrie. A copy of this contract is attached to the plaintiff's statement of demand, marked Exhibit "B."

These two contracts, Exhibits "A" and "B" of the plaintiff's statement of demand, are substantially the same. The only differences which we have been able to discover are these:

The parties named in Exhibit "A" are A. S. Petrie and the defendant; in Exhibit "B," they are A. S. Petrie and the plaintiff.

The time stipulated for the completion of Petrie's contract (Exhibit "A") is January 1st, 1902; that of the plaintiff's contract (Exhibit "B") is March 1st, 1902.

In the Petrie contract (Exhibit "A") two methods of payment are provided: by the one, according to bidding for estimated quantities, monthly, with a final estimate; by the other, a lump sum of $400,000.00 in cash and a like amount in bonds of the corporation, which appears to have been in conformity, *of* the proposition of Mr. Petrie aforesaid.

In the plaintiff's contract (Exhibit "B") there is the very same method of payment as first mentioned in the Petrie contract (Exhibit "A") and the total amount "as per quantities bid upon" is $388,695.44.

In all other respects we find these two contracts are exactly alike. In the plaintiff's contract (Exhibit "B"), the defendant's engineer, not Petrie's, was to direct the work; its engineer, not Petrie's, was to make the monthly estimates; the defendant, not Petrie, was to make these payments from time to time; it, not Petrie, was to retain the percentages; it, not Petrie, was to make the final payment within thirty days after the final estimate. Why this was done it is not necessary to discuss, but it is perfectly plain that one purpose was to get out

the 8,000 shares of stock of the defendant fully paid, as was supposed, and that another purpose was to construct the proposed road with the proceeds of the $400,000.00 of bonds mentioned in the Petrie contract. With the making of the contract with the plaintiff, Petrie passed out of existence, so far as concerns the transactions under consideration.

The portions of said contract, which are material to the questions in this case are as follows:

"During the progress of the work, as long as the contractor shall "fully comply with the terms of this agreement, the Railroad Com- "pany shall, upon or about the fifteenth day of each calendar month, "and at such place as may from time to time be designated by the "Chief Engineer, make to the Contractor an advance payment for "and on account of work done and materials furnished during the "last preceding calendar month; the quantity, character and value "of such work and material to be estimated and certified by the "Chief Engineer with his written approval; * * * Such advance "payment not to exceed eighty-five per cent of the value as thus "estimated and certified.

" * * * * * * *

"When this agreement, in all its parts and in the manner herein "provided, shall have been completely performed on the part of the "Contractor, and such performance shall have been accepted and so "certified in writing by the said Chief Engineer, a final estimate of "the quantity, character and value of the work done and materials "furnished, according to the terms of this agreement, shall be made "by the Chief Engineer, and thereupon and not otherwise sooner, "except at its own election, the said Railroad Company shall, within "thirty (30) days thereafter, pay to the said Contractor, upon his "giving a release under seal to the said Railroad Company from all "claims or demands whatsoever growing in any manner out of this "agreement, all sums of moneys so certified by the said Chief "Engineer to be then remaining due and unpaid upon the work per- "formed under this agreement, after first deducting therefrom any "and all sums herein provided to be retained by the said Railroad "Company; it being expressly understood that such final estimate and "certificate of the Chief Engineer shall be conclusive upon the "parties.

" * * * * * * *

"And it is mutually agreed and distinctly understood that the "decision of the Chief Engineer shall be final and conclusive in any "dispute which may arise between the parties to this agreement "relating to or touching the same, and each and every of said parties "do hereby waive any right of action, suit or suits or other remedy in "law, or otherwise, by virtue of said covenants, so that the decision "of the said Chief Engineer, James H. McRoberts, shall be in the "nature of an award to be final and conclusive on the rights and "claims of said parties."

The above quotations are taken from the plaintiff's contract with Petrie ("Exhibit B") which provisions are the same as those in the defendant's contract with Petrie (Exhibit "A"). To the plaintiff's

contract (Exhibit "B") there was attached, at the request of Mr. Werneberg, the following, duly signed by the parties therein named:

"For value received, The West Side Belt Railroad Company and "John S. Scully and T. N. Barnsdall do hereby guarantee and be- "come surety for the payment of the money mentioned in the within "contract as the same becomes due and payable."

After the making of the contract with Petrie (Exhibit "B"), the plaintiff continued the work of constructing said railroad, which it had already begun, under the direction of the defendant's engineers. The work was finally completed on June 11th, 1903, and was accepted by the defendant's Chief Engineer, Mr. H. T. Douglas. Since which time the said extension of defendant's railroad has been in the possession of the defendant.

James H. McRoberts continued as Chief Engineer in charge of said work of construction until September 11th, 1902, when he was succeeded by H. T. Douglas, and Mr. McRoberts was made Consulting Engineer. Mr. Douglas continued in charge of the work until after its completion and acceptance. He then made out what is termed a Final Estimate, showing that there was due the plaintiff $82,324.03. A copy of this estimate is attached to the defendant's Affidavit of Defense, marked Exhibit "A." The estimate was offered in evidence and marked Exhibit 14. This was finished about September 1st, 1903. It was submitted to Mr. McRoberts, who approved it. But Mr. McRoberts, a few days afterwards, wrote thereon "Less liquidated damages, on account of nonfulfillment of contract $96,970.74." He also wrote under the above "overpayment on contract $14,676.71." The question having arisen with the defendant as to the right to determine these damages and as to the power of anyone, except Mr. McRoberts, to act as Arbiter under the contract, Mr. Douglas resigned as Chief Engineer on September 16th, 1903, and Mr. McRoberts was appointed to succeed him. On September 17th, 1903, Mr. McRoberts called the parties before him as Arbiter. A copy of the notice served is attached to the plaintiff's Statement of Demand, marked Exhibit "E." It is as follows:

"PITTSBURGH, PA., *Sept.* 17, 1903.

"Pittsburgh Construction Company, Bissell Block, Pittsburgh, Pa.

"GENTLEMEN: I have about completed the final estimate for your "work under your contract with the West Side Belt Railroad Com- "pany, and, as the Chief Engineer mentioned in the contract, to "whom has been committed the final decision of all disputes between "the parties, before finally submitting the estimate to you I wish "to notify you that the Railroad Company claims of me a deduction "or credit on the final estimate of the damages sustained by the Rail- "road Company owing to the delay in the completion of the con- "tract.

"If you wish to be heard upon this question, I will meet your "representative and the representatives of the Railroad Company "at my office in the Farmers Bank Building on Monday, September "21st, at 10 o'clock A. M.; or, if this time may be inconvenient to

" you, upon your suggestion I will try and fix a date and place that " will suit your convenience.

"Please let me know what your wishes are in this matter.

"Very truly yours,

"JAMES H. McROBERTS,
"Chief Engineer."

Mr. McRoberts sat as Arbiter on September 21st, 1903, and continued thereafter. More than 2,000 pages of testimony were taken. His Award was rendered on October 24th, 1905. It is entitled "Report of Arbiter between the Pittsburgh Construction Company, Sub-Contractor, and A. S. Petrie, contractor for West Side Belt Railroad Company." In the Report the Arbiter stated in detail the amount of work done and materials furnished by the plaintiff and the value thereof, and certified that there was due the plaintiff $332,750.98, payable within thirty days thereafter. A copy of this Report and Award is attached to the plaintiff's Statement of Demand, marked Exhibit "F."

The plaintiff tendered to the defendant a release under seal of all claims and demands arising out of said agreement, in accordance with the provisions of the contract. The Award not having been paid, suit was brought by the plaintiff against the defendant and said Barnsdall and Scully as guarantors of the said contract, in the United States Circuit Court for the Western District of Pennsylvania, at No. 30 May Term, 1906, of said Court. On February 13th, 1907, that Court entered judgment in favor of the defendant, upon the ground, that the plaintiff had not registered in Pennsylvania as required by law, prior to the making of the said contract with Petrie. Upon appeal to the Circuit Court of Appeals at No. — March Term, 1907, this judgment was affirmed.

Then an Act of the Legislature of Pennsylvania was passed, entitled "An Act validating contracts, bonds or obligations made by corporations of other States, without first having established known places of business and designated authorized agents for the transaction of their business within this Commonwealth, and providing for the enforcement of the same," which was approved May 23rd, 1907 (P. L. 205). Thereupon this action was brought by the Pittsburgh Construction Company directly against the West Side Belt Railroad Company, in which the plaintiff declared upon the Award made by James H. McRoberts, and also for work and labor done and materials furnished, as upon a quantum meruit. Subsequently the West Side Belt Railroad went into the hands of F. H. Skelding and H. W. McMaster, as Receivers; and the record was amended by adding the names of the Receivers as parties defendant. They also filed a Supplemental Affidavit of Defense.

At the trial, the plaintiff offered to prove the value of the work and labor done, and materials furnished, in support of the second count in the Statement of Demand. To this offer objection was made. After having the facts fully presented and upon due consideration, we were then of opinion that the plaintiff could not recover upon an implied contract, after having expressly contracted in writing,

neither fraud, accident or mistake having been alleged or shown. Accordingly the objection was sustained, and the evidence which it was supposed to introduce was excluded. Upon further reflection, we are satisfied that there was no error in said ruling.

At the close of the evidence, counsel on both sides seemed to agree that there was no question of fact to be submitted to the jury. With this view we coincided, and accordingly the jury was instructed to render a verdict for the amount of the plaintiff's claim, with interest, which was done. The defendant then entered this motion for judgment non obstante veredicto.

We have thus recounted at length the facts and circumstances of the transactions involved in this controversy, because they are necessary to be known in order to understand the questions which are to be decided.

The briefs and arguments of counsel indicate that these questions are involved:

I. Is the said judgment of the United States Circuit Court in the suit between these parties a bar to this action, notwithstanding the said Act of May 23rd, 1907?

II. Is the Estimate prepared by H. T. Douglas, Chief Engineer of the defendant, a Final Estimate and conclusive upon the parties to this action?

III. Can the plaintiff, under the pleadings and evidence, support this verdict against the defendant as upon a primary liability?

IV. Is the Award of James H. McRoberts, as Arbiter, conclusive and binding upon the parties in the form presented?

I.

In considering the effect of the judgment in the United States Court, we disregard the form in which that action was brought and the facts, that more parties than the defendant were sued and that the action was apparently one against guarantors. We assume, for the purposes of this consideration, that said action was between the same parties and upon the same cause as this one. Does then the said Act of May 23rd, 1907 revitalize the contract, which the United States Court declared invalid?

The power of the Legislature to pass retroactive or curative Acts cannot be disputed.

Donley vs. Pittsburg, 147 Pa. 348.

That such statutes may be enacted and enforced, even after adjudication of contracts in the Courts, seems to have been decided in a number of cases.

Watson vs. Mercer, 8 Peters, 876.
Hess vs. Werts, 4 S. & R. 356.
Saterlee vs. Matthewson, 16 S. & R. 169.
Mercer vs. Watson, 1 Watts, 330.

The only question then is, whether or not the said Act of May 23rd, 1907 indicates that the intention was to render valid a contract, upon which suit had already been and the contract judicially

determined to be invalid. It seems to us that the language of this Act is sufficient to indicate such a purpose. It legalizes "any contract, bond or obligation" of any corporation under the laws of another state, doing business in this State without having first complied with the laws of Pennsylvania relative thereto, with the proviso that such corporation must have complied with the laws of Pennsylvania, prior to the passage of said statute, and must have paid all taxes that would have accrued. The Act makes no distinction between contracts which have been, and those have not been, litigated. As before stated this plaintiff has complied with all the requirements of this Statute. We are of opinion that the said Act has cured the defect in the plaintiff's contract, and consequently the said judgment is not a bar to this action.

II.

The Estimate, of which Exhibit "A" attached to the Affidavit of Defense is a copy (being Exhibit 14 of the evidence), was made by H. T. Douglas, Chief Engineer of the defendant. It purports to be—

"Estimate No. —. Final.
"West Side Belt Railroad Company.
"To Pittsburgh Construction Co., Contractors.
"final estimate for work done."

The defendant contends that this is the final estimate of the quantity, character and value of the work done, which was made by the Chief Engineer under the authority conferred upon him in the second portion of the contract, quoted in this opinion and found on page six hereof, and that the same is conclusive upon the parties. It asserts that the addition to the estimate of its claim for damages, $96,970.74, and the balance in its favor, $14,676.71, by James H. McRoberts was unauthorized and illegal, as this was admittedly done after the paper came from the hands of Mr. Douglas. In other words, the position of the defendant is that the Estimate of Mr. Douglas, showing $82,324.03 due the plaintiff is the Final Estimate.

It seems to be true, under the authorities, that, when the parties to a contract have made the final estimate of the Chief Engineer conclusive of the quantity, character and value of the work, he can make such estimate himself, without consultation with either party or with anyone, and, when so made, such estimate is conclusive upon both parties, even though there be an arbitration clause in the contract. But such an estimate will be conclusive only as to those things, of which the contract stipulates it shall be conclusive. As to all other disputes, the Arbiter shall make the award. Werneberg vs. Pittsburgh, 210 Pa. 267. And it seems that, after the Chief Engineer has made up and delivered such an estimate, neither he nor anyone else can change it. This principle, however, *does not* prevent the parties themselves from changing the estimate, nor from disregarding it altogether. And this appears to have been what was done in this case. This estimate of Mr. Douglas does not appear to have been treated as final by any of the parties. It was never pub-

lished as such. It was never delivered to the plaintiff. Mr. Werneberg never saw it until in the Court Room, although a copy, not the original, appears to have been before the Arbiter. It reached Mr. Donnelly, Vice President of the defendant, by Mr. McRoberts. But Mr. Donnelly did not accept it. He did not approve it and order the money paid. On the contrary, he immediately interposed a set-off for damages on account of delay in completion of the work. Then, upon advice, an arbitration was called. In the notice for that arbitration, Mr. McRoberts declared to the plaintiff and defendant: "I have about completed the final estimate." No question seems to have been raised by the defendant that a final estimate had been made, and the plaintiff was not aware that one had been made. The arbitration proceeded and the plaintiff, as well as the defendant, went to the expense and long delay of a hearing upon the items of the very estimate made by Mr. Douglas, as well as upon the other disputed subjects. It seems reasonable to us that the time for the defendant to have taken its present position with reference to the final estimate, made by Mr. Douglas, was when that arbitration commenced. The facts with reference to the estimate of Mr. Douglas were undisputed, the testimony with reference to it is uncontradicted, and from these but one inference is to be drawn, and that is that all the parties disregarded said estimate and proceeded as if no such paper had ever existed. No request was made to submit that question of fact to the jury, in this case; and, if the jury had found contrary to the inference above stated, we would have felt it our duty to set the verdict aside.

We are therefore obliged to hold that the paper, Exhibit "A" attached to the Affidavit of Defense, made by Mr. Douglas, was not the Final Estimate of the "quantity, character and value of the work done and materials furnished," in and about the construction of the defendant's railroad.

III.

Can the plaintiff support its verdict against the defendant under the pleadings and evidence?

The proposition of defendant's counsel is that, under the express terms of the writings, the plaintiff has shown a contract between the defendant and Petrie and a subletting by Petrie to the plaintiff; and that consequently there is no contractual relation between the parties to this action. If this were all that appeared, there is no question that the proposition of the defendant's counsel would have to be affirmed.

But, when the writings themselves are examined, it is found that they are hardly what has been above described. It is true there is a contract between the defendant and Petrie (Exhibit "A"), and then there is a contract for the same work between Petrie and the plaintiff, (Exhibit "B"). They are alike, with the exceptions hereinbefore noted. But in his contract with the plaintiff, Petrie did not undertake to pay the plaintiff anything.

The monthly estimates were to be made by the defendant's, not Petrie's, Chief Engineer, and, about the 15th of each month, the

defendant, not Petrie, was to make an advance payment, not to exceed 85% of such estimate, to the plaintiff. And at the completion of the work, the amount of the final estimate was to be paid to the plaintiff, and not to Petrie, by the defendant. In other words, Petrie's contract with the plaintiff (Exhibit "B") provided, not that he would pay, but that the defendant would pay these monthly estimates, and likewise the final estimate thirty days after the work was completed. The form which the writings took was that the defendant guaranteed and became surety for the payment of these monthly estimates. What did that undertaking imply? Why this: the defendant undertook that all these payments, which Petrie covenanted the defendant would make to the plaintiff, would be made. That is to say, the defendant (the owner of the property) directly engaged with the plaintiff (it may be called a sub-contractor) that the work and material, which the latter should do and furnish, would be paid for by the former. In short, the defendant guaranteed and became surety for its own obligation. The form of the writings does not, in our opinion, sustain the above proposition submitted by the defendant.

This view is strengthened by the other considerations which appear. It is not denied that Mr. Wernsberg made his bid for the work directly to the defendant, and that the bid was accepted by the latter. This was before there was any suggestion of a contract with Petrie. It is not denied that, for the purposes of the defendant and of its Officers and Directors, the contract was made between the defendant and Petrie, and that, under the direction and in behalf of the defendant, Petrie made the contract with the plaintiff. The averments of the Statement of Demand are not denied, that Petrie was not a contractor and had no means or experience to enable him to perform this contract; that it was never intended by the parties that he should perform it; and that in fact he never did do anything in the way of performance. The testimony is uncontradicted that the plaintiff's officers never heard of Petrie, in connection with the transaction until within a few days prior to May 24th, 1901, when its contract with him was signed; that Mr. Scully, President of the defendant, told the plaintiff's officers that the form which the writings took was but a formality, that the plaintiff's relations would be with the defendant, and that the defendant would assume the payments.

Besides this, note the conduct of the parties subsequently. The defendant dealt directly with the plaintiff. The defendant's Chief Engineer directed the work and made these monthly estimates directly between the plaintiff and defendant. The defendant paid these estimates, less the percentages, from time to time as they were submitted, aggregating a total of $540,737.63. What the defendant now contends was the final estimate, made by its Chief Engineer, is headed "West Side Belt Railroad Company to Pittsburgh Construction Company, Contractors." This course of conduct of the parties shows their construction of the writings and supports the contention that Petrie was a mere figurehead.

In addition, the defendant received by virtue of these transactions

the proceeds of 8,000 shares of its stock, apparently. By means of these transactions, it obtained the proceeds of its $400,000.00 of bonds, presumably at par in the absence of evidence to the contrary, which Barnsdall and Scully undertook to sell. Thus it had more than sufficient funds with which to pay for the work which the plaintiff undertook to do.

In view of all these circumstances, it is plain that the defendant assumed the contract between Petrie and the plaintiff, and that Petrie was in fact the defendant. The form of the writings indicate such an assumption and the substance of the transactions clearly show it. We are of opinion that the plaintiff can maintain this action against the defendant.

IV.

Can the plaintiff sustain its verdict upon the Award of James H. McRoberts?

The contentions of the defendant, as we understand them, are that it was not a party to that arbitration, except in so far as it was a guarantor, that the Arbiter exceeded his powers, and that there has been no adjudication of the amount of damages, which the defendant claimed for delay against the plaintiff. These propositions were urged upon us with great force, ingenuity and ab/il-ty. If we are correct in what we have hereinbefore held, that Petrie was a mere figurehead and that his contract with the plaintiff was in fact the contract of defendant, we cannot see why the defendant was not a party principal to that arbitration. Whether the award was against Petrie or against the defendant, it was equally the stipulation that the defendant, not Petrie nor any other party, was to pay it within thirty days thereafter.

It is not controverted that the arbitration was called at the request of the defendant, and that the plaintiff and defendant, and no other parties, were summoned to appear. The notice to the plaintiff (pages 8 and 9 of this opinion) described the call as "under *your* contract with the *West Side Belt Railroad Company*," and informed the plaintiff that the "Railroad Company" claimed a credit on the final estimate of damages for delay in completion of the work. It is not denied that both plaintiff and defendant, and no other parties, did appear before the Arbiter and were represented by counsel, and that they "then and thereafter entered into an arbitration before him (McRoberts) of all matters in dispute arising out of the performance of said contract, and especially of the matters embraced in Exhibit "D", being the plaintiff's claim for extra work and material and cost of construction. This arbitration continued for about eighteen months, fifty-two meetings being held and a large amount of testimony taken. After the arbitration had continued about fifteen months, the other parties, Petrie, Barnsdall and Scully, were notified to appear, this being occasioned by a suggestion as to the form of the contract; and they did appear by counsel. But the arbitration was between the plaintiff and this defendant. These two were the parties to the contest. After having invoked the arbitration and after having conducted it through to

the end, it is now too late, in our opinion, for the defendant to allege that it was not a party.

The defendant contends that the Arbiter went beyond the submission and that therefore his Report upon these matters cannot be sustained. It asserts that but one question was submitted to the Arbiter, viz: the damages which the defendant claimed for delay; and that whatever appears in the Award of McRoberts outside of that question was in excess of the submission. It is true that, in the notice of the first meeting of the arbitration, the question of defendant's claim for damages was the only one suggested, and that, at this meeting, the Arbiter suggested the same question as the one before him. But the right of the Arbiter to determine this question was immediately disputed by the plaintiff on the ground, that the alleged damages were not liquidated and that they did not relate to or grow out of the agreement. It was claimed by the plaintiff that the questions before the Arbiter were the completion of the work, its value, and whether or not there were extra work and material, and how much. The plaintiff presented a claim for extras, amounting to almost $300,000.00. No objection seems to have been raised as to the power of the Arbiter to pass upon the claim presented by the plaintiff. The foregoing facts appear in the Notes of the meetings before the Arbiter, which were offered in evidence at this trial by the defendant and were not disputed. Thereupon the arbitration proceeded, as we have above stated.

Whilst it is true that the decision of an Arbiter must be confined to the questions which have been submitted to him, yet we do not understand that it is incompetent for the parties themselves to extend the arbitration to questions beyond those first submitted, provided they are within the terms of the reference clause of the contract. We also understand that such an extension of the arbitration may be shown, not alone by express agreement, but also by such a course of procedure before the Arbiter as will estop either party from denying the fact. The uncontradicted evidence, the admissions of the pleadings and the Report of the Arbiter all show that the arbitration was extended to all matters in dispute arising out of the performance of said contract. How then can the defendant be heard to say that the Arbiter exceeded his powers, by going into matters other than the defendant's claim for damages, when it appears that the defendant participated in all that was done, without objection on its part? The defendant had fair notice, at the very first meeting, that the plaintiff was claiming a large amount for extra work and materials, but it allowed the arbitration to proceed upon these disputes at great length, without protesting. There is no doubt of the power of the Arbiter, under the reference clause of the contract, to hear and determine these questions, beyond the claim for damages, and there is just as little doubt that he did hear and determine them without objection or protest from either party. If the defendant had felt that the arbitration was confined to the question of its damages alone, it should have said so promptly. It is now too late, in our opinion, for it to successfully interpose that objection.

Under the contract, the plaintiff was to have completed the work, on or before March 1st, 1902. It was not in fact completed and accepted until June 11th, 1903. The defendant has a claim for damages, owing to this delay. On account of the changes and additions that were made from time to time, the work of construction was very greatly increased. The plaintiff claimed that these changes caused the delay and that no part of the delay was due to it. The position of the defendant is that its claim for damages was the subject, which the Arbiter was called to adjust, and that he has not done so. It claims that it was entitled to a day in Court, which it has not had.

It appears that the defendant did, at the first meeting before the Arbiter, present its claim for damages amounting to $96,970.74. This was in the shape of a bill, a copy of which is found on page 224 of the Printed Record of the case in the United States Court. It is not pretended that any evidence was offered before the Arbiter in support of any items in said Bill.

The plaintiff took the position before the Arbiter that he had no authority to pass upon this subject; and it now takes the same position. We are unable to agree with the plaintiff as to this contention. It seems to us that, under the terms of the arbitration clause of the contract, the Arbiter had the power to pass upon the subject of delays in the completion of the work. But we are also of opinion that the items set forth in said Bill are not the proper measure of damages for such alleged delay. That point was decided in the case of Jolly vs. The Parral & Durange Railroad Co., at No. 17 March Term, 1900, of the Common Pleas No. 1, Allegheny County, Pennsylvania. So that, even if the defendant had attempted to prove its claim, it could not have proved the items set forth in said Bill.

The defendant contends that the Arbiter disregarded its claim altogether and that he made no findings upon the very question which he was called to determine. There is certainly no distinct finding in the Award of the Arbiter in favor of the defendant's claim, nor is there any distinct finding against it. But it does not follow that the claim was not considered and determined, either as having been abandoned or as having failed for want of proof. As before stated, the defendant did not avail itself of the opportunity which it then had to prove its claim. How then could it expect the Arbiter to make a finding in its favor upon this subject? It seems to us that the silence of the Award, upon the distinct subject of the defendant's claim for damages, is to be taken either that the claim had been abandoned or that it had not been proved.

The defendant, however, contends that the Award itself shows that the Arbiter disregarded its claim as not proper in that proceeding. We do not think this is a just criticism of the award. The Arbiter does not say that he disregarded or threw out this claim of the defendant. He does say that some matters, wholly irrelevant, were eliminated, but he does not say what they were. He certainly does not specify the defendant's claim for damages as one of them.

On the other hand, the Award states that every question and claim

of either party was duly considered; and the Arbiter testified at this trial that he had very carefully considered all matters submitted on both sides.

In view of the foregoing, how can it be said that the defendant has not had its day in Court? If it had, then the defendant has no just cause for complaint that its claim for damages has not been allowed.

But, even if the Arbiter did refuse to consider the defendant's claim, would the Award forever conclude the defendant? Under the authority of Pennsylvania Tack Works vs. Sowers, 11 W. N. C. 83, it appears that the defendant would not be concluded: In that case, the Arbitrators had declined to consider a claim of the defendant, and so stated. The Court afterwards credited the claim. Upon appeal, the judgment was reversed, Justice Green saying:

"The referees have simply refused to determine the merits of the "claim. This leaves the defendant at full liberty to prosecute it "before the tribunals, and if he can establish its legal validity and "obligation, he can have it judicially determined in his favor."

If this be true, why could not the defendant have established its claim for damages upon this trial. It did set up the claim in its Affidavit of Defense, but it did not attempt to offer any testimony in support of it.

The parties to this controversy chose Mr. McRoberts as the person who was to determine "any dispute which may arise between the parties to this agreement relating to or touching the same," and they have agreed that his Award shall be final and conclusive. He has made his Award; and there is now nothing for the Courts to do but enforce it. We are not concerned with any alleged inconsistent positions taken by Mr. McRoberts, during the transactions, nor with any unnecessary verbiage in his Report. There was no allegation nor was there any proof of fraud or collusion in making the Report and Award. Upon no other grounds could we disturb it, as we understand the authorities.

And now, to-wit: May 1st, 1909, the Rule for judgment for the defendant, non obstante veredicto, is discharged, and it is now ordered that judgment in favor of the plaintiff and against the defendant be entered upon the verdict.

To which ruling the defendant excepts and, at its instance, a Bill of Exceptions is sealed.

JOSEPH M. SWEARINGEN, *P. J.* [SEAL.]

[Endorsed:] No. 398, Fourth Term, 1907. Pittsburgh Construction Company, a Corporation, vs. West Side Belt Railroad Company, a Corporation. Opinion and Order. Filed May 1, 1909.

(Record, page 495.)

In the Supreme Court of Pennsylvania, Western District.

No. 132, October Term, 1909.

Appeal C. P. No. 4 Alley. Co.

Filed February 14, 1910.

PITTSBURGH CONSTRUCTION COMPANY
vs.
WEST SIDE BELT RAILROAD COMPANY and FRANCIS H. SKELDING, and HENRY W. MCMASTER, Receivers, Appellants.

STEWART, *J.*:

In considering this case it is necessary first of all to determine the legal relation inter se of the parties to the controversy. The defendant company, here the appellant, having determined upon an extension of its railroad, accepted the bid of one Petrie, who had been secretary of the company but had resigned to enter into new relation towards it, for the entire completion of the proposed work according to the plans and specifications prepared by the company, for the sum of $400,000 in cash, and a like amount in the mortgage bonds of the company. A formal contract was thereupon entered into between Petrie and the Company by which the former engaged to construct and complete the proposed work in the manner and within the time called for by the specifications, and the latter agreed to pay for the work accordingly. This contract is dated 25 April, 1901. On the 24th of May following Petrie, with the consent and approval of the Railroad Company, entered into a written contract with the Pittsburgh Construction Company, here the appellee, which contract, except as it differs with respect to the consideration to be paid for the work, is simply a transcript of the contract between Petrie and the Railroad Company, and was an undertaking by the Construction Company to do the work which Petrie by his contract with the Railroad Company had engaged to do, but upon which he had not entered. Immediately following the signature of the parties to this later contract this appears, "For value received the Westside Belt Company and John S. Scully and F. S. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in the within contract as the same becomes due and payable." This is followed by a due execution by the parties named. The authority of the President of the Railroad Company to enter into this obligation on behalf of the company is conceded. With Scully and Barnsdall we have no present concern; our inquiry relates only to the Railroad Company, and the measure of its liability. In this action it is sought to charge it as a principal, primary debtor, notwithstanding by the written terms of the obligations, the liability expressed is that of guaranty and surety. This presents the first

question for our consideration. On behalf of appellant it is claimed that the obligation it incurred was that of guarantor, and that its liability therefor is secondary. Much depends on the answer to be given. Assuming a secondary liability on the part of the railroad company, the argument derives conclusions most prejudicial to the Construction Company's present demands, as will appear later on. The assumption however takes account of but a single covenant in the obligation, whereas there are two distinct covenants, one of guaranty and one of suretyship. There is no contention that the obligation is to be considered in any other way than in accordance with its express terms. It is not even suggested that the clear distinction that exists in law between the two relations of guarantor and surety was overlooked, and that all that was intended was a contract of guaranty. The assumption is palpably without warrant. Having once entered into a covenant of both guaranty and suretyship, it could not thereafter be optional with the covenantor to determine in which of the two relations it would stand; it was however for the other party to elect under which it would pursue its remedy for any default. As surety, the Railroad Company here took upon itself a direct and immediate liability. Suretyship always implies original undertaking, and the measure of liability in such case is the extent of the principal's liability. A surety assumes to perform the contract of the principal debtor, if he should not, and the undertaking is immediate and direct that the act shall be done, which if not done, makes the surety responsible at once. Riegart v. White, 52 Pa. 438; Riddle v. Thompson, 104 Pa. 330; Phila. & R. R. Co. v. Knight, et al. 124 Pa. 188. If regard be had to the situation of the parties and the object they had in view, it would require no strained construction of the obligation to impose on the Railroad Company the obligations of a principal debtor. So far as concerns this dispute, the distinction would come to nothing, for the liability to the appellee would be the same whether principal or surety. The appellant under either contract was to pay the money. It contracted with Petrie that it would pay to him. Petrie, under his later contract with the Construction Company, contracted that the Railroad Company would pay directly to the Construction Company. The debt incurred in the building the railroad was in either case to be paid by the Railroad Company. It is somewhat anomalous for one to become surety for the payment of money due from himself; and yet if we confine ourselves to the strict letter of the obligation, that is what the Railroad Company did in this instance. When it signed the obligation of suretyship "for the payment of the money mentioned in the within contract as the same becomes due and payable," since the money was due from itself, it might well be argued that it was an assumption of liability as principal debtor. The subsequent dealings between the parties show very conclusively that both so understood the relations between them. We conclude on both grounds that the written contract between Petrie and the Construction Company is the law *of* governing the present case, quite as much as though the appellant's name appeared therein as a contracting party.

The contract between Petrie and the Construction Company, as well as the earlier contract between Petrie and the Railroad Company, con-

tained the following provision: "When this agreement, in all its parts and in the manner herein provided, shall have been completely performed on the part of the contractor, and such performance shall have been accepted and so certified in writing by the said chief engineer, a final estimate of the quantity, character and value of the work done and materials furnished, according to the terms of this agreement, shall be made by the chief engineer, and thereupon and not otherwise sooner, except at its own election, the Railroad Company shall within thirty days thereafter pay to the said contractor * * * all sums of money so certified by the said chief engineer to be then remaining due and unpaid upon the work performed under this agreement, after first deducting therefrom any and all sums herein provided to be retained by the said Railroad Company; it being expressly understood that such final estimate and certificate of the chief engineer shall be conclusive upon the parties." Both contracts contained this further provision: "And it is mutually agreed and distinctly understood that the decision of the chief engineer shall be final and conclusive in any dispute that may arise between the parties to this agreement relating to or touching the same, and each and every of said parties do herein waive any right of action, suit or suits, or any other remedy in law, or otherwise by virtue of said covenant so that the decision of said Chief Engineer, James H. McRoberts, shall in the nature of an award be final and conclusive on the rights and claims of said parties." The present action was brought to recover on an award made under the last quoted provision by the chief engineer McRoberts for $332,750.98 in favor of appellee as against Petrie. The document purports to be the report of an "arbiter between the Pittsburgh Construction Company, subcontractor, and A. S. Petrie, contractor for West Side Belt Railroad Company." For a correct understanding of the actual dispute a further recital of facts is here required. At the inception of the transaction McRoberts was chief engineer. Later on as the work progressed he was made consulting engineer and H. T. Douglas was substituted as chief engineer. The work of construction was very largely in excess of what was originally contemplated. The entire work was to have been completed within a year, but eighteen months were required, and it was not until 11th of June, 1903, that through the chief engineer Douglas the Construction Company was notified of its acceptance. Thereupon Douglas began preparations for making an estimate of the work done. About 10th September following he completed his estimate, which showed there was due the Construction Company the sum of $82,324.03. This estimate, signed by himself and certified by the consulting engineer McRoberts, as correctly summarized, was handed to Mr. Donnelly, the Vice President of the Railroad Company. The day following McRoberts obtained this estimate from Donnelly, and in the latter's office entered upon it the following items: "Less liquidated damages on account of non-fulfillment of contract $92,970.74." "Over Payment on contract $14,676.71." Thus bringing the Construction Company in debt in the sum of $25,323.42. McRoberts testified that he did this at the instance and request of Donnelly; and in this he is not contradicted. The day following Donnelly submitted the award as thus amended to the

counsel of the Railroad Company, and was advised that the items added by McRoberts did not properly fall within the purview of a final estimate, but were proper subjects for consideration and judgment by the Chief Engineer as arbiter; and that inasmuch as McRoberts, as Chief Engineer, was named as arbiter in the contract, he should be reappointed to that place. His appointment accordingly was made 16th September, 1903. Immediately thereupon he served the following written notice, prepared by counsel of the Railroad Company, upon the Construction Company: "Gentlemen: I have about completed the final estimate for your work under your contract with the West Side Belt Railroad Company, and as the Chief Engineer mentioned in the contract, to whom has been committed the final decision of all disputes between the parties, before finally submitting the estimate to you I wish to notify you that the railroad company claims of me a deduction for credit on the final estimate of the damages sustained by the Railroad Company owing to the delay in the completion of the contract. If you wish to be heard upon this question, I will meet your representative and the representatives of the Railroad Company at my office in the Farmers Bank Building on Monday, September 21st, at 10 o'clock A. M.; or, if this time may be inconvenient to you, upon your suggestion I will try and fix a date and place that will suit your convenience." At the first meeting under this notice the appellant company appeared and submitted its claim for damages amounting to $96,970.74; but it nowhere appears that either then or at any subsequent meeting appellant offered any evidence in support of the claim. The appellee on the other hand submitted a claim for extra work which it alleged was not included in the estimate prepared by Douglas, amounting to nearly $300,000. It does not appear that any one connected with the Construction Company up to this time had any knowledge of the estimate prepared by Douglas, and by him delivered to the Vice President of the Railroad Company. The written notice served by McRoberts, at the instance of the Railroad Company, clearly implied that no final estimate had as yet been made, and that none had been completed. The arbitration thus entered upon proceeded, and both parties participated in an exhaustive investigation, both upon the items embraced in the Douglas estimate as well as other matters in dispute, without objection or protest. The thoroughness and extent of the investigation may be judged from the fact that in the fifty-two hearings that were held more than two thousand pages of testimony were taken and five hundred exhibits filed. Each side produced witnesses, and cross-examined the opposing witnesses, touching the claim asserted by the Construction Company. Upon this state of facts, undisputed, the trial judge held that there could be but one inference, namely, that both parties by common consent disregarded and ignored the Douglas estimate, and proceeded as though such paper had never existed. He accordingly directed a verdict for the plaintiff for the amount of the arbiter's award. This ruling necessarily implied a waiver by defendant of all claim under the Douglas estimate; and the contention now made on behalf of appellant, is that this was a question of fact that the jury alone could determine.

The sufficiency of the Douglas estimate to meet the requirements of the contract need not be considered except incidentally. It is quite true that ordinarily the question of waiver is one of fact for the jury; but it is not always so. When the facts are undisputed, it becomes a matter of legal inference. Waiver rests fundamentally on the doctrine of estoppel; but where the facts are ascertained whether the doctrine applies is for the court to decide; Lewis v. Carstairs, 5 W. & S. 205. The facts here relied upon as establishing a waiver are, first, the notice from McRoberts as arbiter; and second, the active participation of the defendant without protest in an arbitration which asserted jurisdiction to make and conclude a final estimate regardless of what had been done before. The notice from McRoberts calling for the arbitration must be taken as the act of the defendant company; the demand for the arbitration came from it, and the notice was prepared by its own counsel. It contained an express acknowledgment that up to that time no final estimate had been completed, and an equally express acknowledgment that the final estimate when made was to be made by McRoberts. The language of the notice was "I have about completed the final estimate. * * * Before finally submitting the estimate to you I shall" etc. It was pursuant to this notice that the defendant company was present, through its representative, at the arbitration, submitted its claim for damages, and acquiesced without protest or objection in the jurisdiction asserted by the arbiter to hear and determine, not only all matters in dispute, but in particular such matters as were essential to the completion of a final estimate of the work done by the plaintiff company; never once asserting the Douglas estimate as a bar, or indicating any reliance upon it as the final estimate. In this connection it is to be remembered that the Douglas estimate remained in the hands of the defendant company. The fact of its existence had never been communicated to the plaintiff company, and so far as appears no copy of it was ever served upon the plaintiff company, the party best entitled to it, since as originally delivered it contained an award in its favor. Under such state of facts, about which there was no contention, it was not error in the trial judge to pronounce upon the effect of the evidence. He rightly concluded that had the case gone to the jury, and a verdict been rendered against such proofs, the court would have been bound to set it aside. "When it is the duty of a judge to control a verdict he is not to be reversed for exercising his authority in advance of the verdict, and saving thereby the delay and expense of a new trial." Graff v. Railroad Co., 31 Pa. 489. It follows that the McRoberts award became the true measure of appellant's liability, whether the latter be regarded as principal or surety. The assignments of error raise no question as to its sufficiency as an award under the contract between the appellee and Petrie. If sufficient under that contract, it fixes appellant's liability. On the argument of the case, it was urged upon our attention that the arbiter in his report expressly states that in reaching his conclusions he disregarded as irrelevant some evidence and claims, which might be relevant in a final settlement between the

appellant and the contractor. But we have no assignment of error challenging the sufficiency of the award as an award. When offered in evidence on the trial of the case a single objection was made to its admission, namely, that the award was "between the plaintiff and A. S. Petrie, sub-contractor, for the doing of this work, but who is not a party to this suit." This objection was properly overruled. The appellant was a party to the inquiry before the arbiter, was duly served with notice, attended the meetings and participated in the investigation. It had all the rights Petrie would have had in making defense. The award was a common-law award, which according to the express agreement of the parties was to be "final and conclusive on the rights and claims of said parties." Under such stipulation the parties take the hazard of mistake in the tribunal they have selected, and the award is not to be set aside for mere mistake of law or fact. "Unless the evidence offered and received in the court below tended to prove something more than mere mistake of fact or of law; unless it went to establish misbehavior on the part of the arbitrators, or the plaintiff, it was inadmissible to affect the award upon which the suit was brought." Speer v. Bidwell, 44 Pa. 23. If appellant would derive from the admission in the report itself an inference of misconduct on the part of the arbiter, that point should have been made in the court below. The objection to the award comes too late, since we are here confined to the consideration of only what is assigned as error.

After the filing of the award, and previous to the bringing of the present action, the appellee brought suit in the United States Circuit Court for the Western District of Pennsylvania, against the West Side Belt R. R. Co., John S. Scully and Theodore N. Barnsdall, for the recovery of the amount of the award, in which action it was sought to charge the parties named on their contract of guaranty and suretyship. A verdict was directed for the plaintiff for the full amount of the award, subject to the court's decision on a point reserved. Subsequently judgment non obstante was entered for the defendants. It appeared on the trial that the plaintiff was a West Virginia corporation chartered May, 1901, and that its contract with Petrie had been entered into 24 May, 1901, whereas the corporation had not been registered in this state until 15 June following. This sufficiently indicates the point reserved. Our Act of Assembly of 1874 provides that it shall not be lawful for any such (foreign) corporation to do any business in the Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of the said corporation, and signed by the President or Secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and that the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement shall be preserved for public insection by each of said agents in each and every of such offices. Because of the admitted failure of the plaintiff company to comply with the provi-

sions of this act before entering into the contract, the court held that there could be no recovery on the contract. The judgment rendered was as follows: "Judgment therefore will be entered in favor of the defendant non obstante veredicto, but such judgment shall not bar, in subsequent suit or proceeding by the plaintiff for services performed." On appeal, the judgment, saving the right of plaintiff to bring an action on a quantum meruit for work done, was affirmed by the United States Circuit Court of Appeals. The record of that case was pleaded in bar in this. In reply plaintiff invoked the Act 23 May, 1907, P. L. 205, which provides: "That whenever any corporation, organized and existing under the laws of any other state and doing business within this commonwealth, shall have heretofore entered into any contract, bond or obligation with any person, firm or corporation, without having first established a known place or places of business and designated an authorized agent or agents for the transaction of its business in this Commonwealth, the said contract, bond or obligation shall be binding upon the parties thereto and such corporation may enforce the same in the Courts of this commonwealth; provided, that it has subsequently, and prior to the passage of this act, complied with the laws of this Commonwealth by establishing a known place or places of business and designated an authorized agent or agents for the transaction of its business within the same; and provided further, that it shall, before commencing any suit upon such contract, bond or obligation pay all taxes that would have accrued to the Commonwealth of Pennsylvania if it had complied with the laws of Pennsylvania at the time of beginning to do business therein." The plaintiff's full compliance with all that is required under this act was shown. The court held that the present action was not barred by the judgment in the Circuit Court. We are of opinion that the ruling was correct. We may concede that so far as concerns the appellant here the parties were the same, and that the cause of action was the same in both suits; but it remains true nevertheless that the adjudication of the Circuit Court of the United States was not on the merits of the case. The judgment there clearly and certainly discloses this much. It is based exclusively on the plaintiff's disability to maintain the action because of its failure to register within the state before the contract sued upon was entered into; it expressly reserves to the plaintiff the right to sue for services performed. "The judgment must be upon the merits; if the real merits of the action are not decided in the prior judgment, it is no bar." Herman on Estoppel 278.

Our own cases have uniformly recognized the doctrine here asserted. In Carmony v. Hoober, 5 Pa. 305 it is said: "The maxim which forbids a second judicial agitation of rem judicatum by the same parties or their privies, is one of essential consequence in its application, and therefore to be rigidly adhered to within the bounds that have been assigned to it. But we think it has never been carried to the verge to which the learned judge before whom the cause was tried has pushed it in the present instance. On the contrary, it has been held an acknowledged principle, that when it can be gath-

ered from the record, the merits of the controversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit: for, as was observed by a very eminent jurist, in such case the argument that the causes of action were the same is virtually negatived. (Per Story, J. in Hughes v. Blake, 1 Mason, 519.) This exception to the maxim invoked by the defendant in error, if indeed it can strictly be called an exception, since it assumes the character of a general rule, is almost, if not altogether, co-existent with the rule itself. * * * The rule is the same if the first cause went off because the court had not jurisdiction, or because the debt or duty sued for was not then due: Estill v. Taul, 2 Yerg. 467, 470; or, as was determined by this court in Kane vs. Fisher, 2 Watts, 253, where the record shows that part of a demand, consisting of several articles capable of being separated, was not due, though counted for at the time of suit brought. But approaching somewhat nearer to the precise point presented for adjudication by the case at bar, it will be found that when it appears the first suit was prematurely commenced no advantage can be taken of a judgment rendered therein against the plaintiff, unless indeed it be shown the parties waived the irregularity and consented to an investigation of merits. Thus it has been correctly decided that a judgment rendered in favor of the defendant, in an action against the endorser of a promissory note, brought *before notice given*, cannot be set up as a bar to a second action *after notice*, because it is apparent that in the first suit the plaintiff had no cause of action: New England Bank v. Lewis, 8 Pick. 113. Many similar cases might be cited, all proceeding on the ground that where the merits of the second suit were necessarily excluded in the former, the plaintiff ought not to be barred. Indeed a contrary rule would be founded in such rank injustice as to be insupportable, and had such an one been even entertained in the earlier ages of the law, when reason and truth were but too often made to give way before the fancied force of technical subleties and hair-drawn distinctions, it must long since have succumbed to the enlightened wisdom which tolerates litigation only as a means of administering uniform justice." In Coleman's Appeal, 62 Pa. 252, it is said by Sharswood, J.: "Whenever a judgment is relied on for this purpose, it is competent for the adverse party to show that the particular point was not adjudicated if in law it could have been rendered upon any other. * * * The principle is well stated by Mr. Justice Nelson in The Packet Company v. Sickles, 5 Wallace, S. C. Rep. 592: 'As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive, per se, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been

rendered without deciding the particular matter, it will be considered to have settled that matter as to all future actions between the parties; and further, in cases in which the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact, but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be conclusive.' " Haws v. Tiernan, 53 Pa. 192, Follansbee v. Walker, 74 Id. 306, Weighley v. Coffman, 144 Id. 489, are among our own cases which are to the same effect. The prior adjudication settled nothing with respect to the merits of this case; all that was there adjudicated was the plaintiff's right to maintain its action as an unregistered foreign corporation. Wherein does the present case differ from the case of Bank v. Lewis, 8 Pick. 113, approvingly cited by Bell, J. in Carmony v. Hoober, supra, in which it was held that a judgment rendered in favor of a defendant in an action against the endorser of a promissory note brought before notice given, cannot be set up as a bar to a second action after notice, because it was apparent that in first suit plaintiff had no cause of action? The case of Roney v. Westlake, 216 Pa. 374, so much relied upon by appellant's counsel as sustaining a different view, conflicts in no respect with the cases we have cited. That case decided that a verdict and judgment in favor of a defendant in an action on a promissory note which was not stamped with an internal revenue stamp is res judicata as to a subsequent action between the same parties on the same note after a revenue stamp had been placed thereon. The ground on which the decision was rested was that in the first action because of express provision in the act of Congress disqualifying unstamped instruments as matters of evidence, the note itself not being admissible, the plaintiff was without competent evidence to establish his claim, and having submitted his claim to the jury and permitted a verdict and judgment to go against him, he was concluded because the verdict was the result of failure to establish the claim by competent evidence. Our Brother Mestrezat, in his opinion in that case, clearly marks the distinction that is to be observed. He says: "The case in hand must be distinguished from that class of cases where the judgment set up in bar of the second action is not upon the merits of the question involved in litigation. Those cases are where the judgment is founded upon a lack of jurisdiction, a nonjoinder or misjoinder of parties, plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleadings, or the like; 24 Am. & Eng. Ency. of Law, 2d Ed., 794; or where the suit is discontinued, the plaintiff becomes non suit, the debt is not yet due, or there is a temporary disability of the plaintiff to sue: 1 Greenleaf on Evidence, Secs. 529, 530; Weig-ley v. Coffman, 144 Pa. 489. Judgments in those cases are not obtained upon the merits, and hence are not a bar to another action." The effect of the act of 23 May, 1897 was to remove the impediment created by the prior Act to the en-

forcement of the contract, and the plaintiff at once acquired the right to maintain an action thereon.

It is unnecessary to pursue the inquiry further. The plaintiff having complied with all the provisions of the Act of 1874, it was in position to enforce by action at law the contract between it and the defendant. In what we have said the several assignments of error have all been considered. They are overruled and the

Judgment is affirmed.

IN THE

Supreme Court of the United States

No. 681 October Term, 1910.

West Side Belt Railroad Company, Francis H. Skelding and Henry W. McMaster, Receivers,
Plaintiffs in Error,

vs.

Pittsburgh Construction Company,
Defendant in Error.

Motion to Dismiss Writ of Error, or Affirm Judgment.

EDWIN W. SMITH,
SAMUEL MCCLAY,
Counsel for defendant in error for the purposes of these motions.

Pittsburgh Printing Company.

In the Supreme Court of the United States

No. 681 October Term, 1910.

West Side Belt Railroad Company, Francis H. Skelding and Henry W. McMaster, Receivers,
Plaintiffs in Error,

vs.

Pittsburgh Construction Company,
Defendant in Error.

Motion to Dismiss Writ of Error, or Affirm Judgment.

Comes now the defendant in error, the Pittsburgh Construction Company, by Edwin W. Smith and Samuel McClay, counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled case for want of jurisdiction, because there is no question arising under the Constitution and laws of the United States involved therein; or if the writ of error shall not be dismissed, that the judgment of the said Supreme Court of Pennsylvania be affirmed, on the ground that although, in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the question upon which jurisdiction depends is so frivolous as not to need further argument.

EDWIN W. SMITH,
SAMUEL MCCLAY,
Counsel for defendant in Error for the purposes of these motions.

IN THE
SUPREME COURT OF THE UNITED STATES.

WEST SIDE BELT RAILROAD COMPANY, FRANCIS H. SKELDING and HENRY W. McMASTER, Receivers, *Plaintiffs in Error,* *vs.* PITTSBURGH CONSTRUCTION COMPANY, *Defendant in Error.*	No. 681 October Term, 1910.

Notice.

TO THOMAS PATTERSON, ESQ.,
Of Counsel for Plaintiffs in Error:

PLEASE TAKE NOTICE, That on the fifth day of December, 1910, at the opening of Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motions, in support thereof.

EDWIN W. SMITH,
SAMUEL McCLAY,
Counsel for defendant in Error for the purposes of these motions.

In The

SUPREME COURT OF THE UNITED STATES.

No. 681 October Term, 1910.

West Side Belt Railroad Company, Francis H. Skelding and Henry W. McMaster, Receivers,
Plaintiffs in Error,

vs.

Pittsburgh Construction Company,
Defendant in Error.

BRIEF OF ARGUMENT.

Statement of Facts.

The Pittsburgh Construction Company was incorporated under the laws of the State of West Virginia, on May 14, 1901, and was registered on June 15, 1901, in the Commonwealth of Pennsylvania, under the provisions of an Act of Assembly of that Commonwealth, approved April 22, 1874, P. L. 108. This Act of Assembly provides that no foreign corporation shall do any business in the Commonwealth until it has first established an office or offices, and appointed an agent or agents for the transaction of its business therein, and until it has filed in the office of the Secretary of the Commonwealth a statement, under its seal, signed by its president or Secretary, showing the title and object of the corporation, the location of its office or offices, and the name or names of its authorized agent or agents. The act also provides that the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each of said offices, and made failure to comply therewith a misdemeanor, and prescribed penalties for violations thereof.

The West Side Belt Railroad Company was a corporation organized under the laws of Pennsylvania, for the construction and operation of a railroad from Pittsburgh to Bruce Station, on the Baltimore & Ohio Railroad, a distance of about twelve miles.

The West Side Belt Railroad Company desired to build its road, and for that purpose, on April 25, 1901, gave to one A. S. Petrie, a contract for the construction thereof. Petrie, until April 17, 1901, had been the Secretary of the Railroad Company, had never been engaged in the contracting business, and it was not intended that he should be the contractor and perform the work.

On May 24, 1901, with the consent of the Railroad Company, he sub-let to the Pittsburgh Construction Company the entire work, and a formal contract, bearing that date, was made between A. S. Petrie and the Pittsburgh Construction Company, in which Petrie agreed that the West Side Belt Railroad Company would pay to the Pittsburgh Construction Company all moneys becoming due thereunder for work done and materials furnished. This contract the West Side Belt Railroad Company, by its acts, assumed, and made payments to the Pittsburgh Construction Company from time to time to the amount of $540,737.63, thereunder.

H. J. Werneberg had previously bid for the work in his own name, but on behalf of the company which was subsequently organized, under the name of the Pittsburgh Construction Company. Certain officers of the Railroad Company devised the scheme of giving the contract to A. S. Petrie to build the twelve miles of road, and consenting to his subletting it, for the sole purpose of getting out certain of its stocks as full paid and non-assessible. The Pittsburgh Construction Company was the contractor, and neither the Railroad Company nor it ever contemplated that Petrie should be

more than a figure-head. The West Side Belt Company was at all times the principal debtor.

The Railroad Company, John S. Scully and T. N. Barnsdall guaranteed and became sureties for the payment of all moneys becoming due under the contract.

Under this contract, James H. McRoberts, the Chief Engineer of the Railroad Company, was made final arbiter to determine all matters in dispute.

Disputes arose as to the amounts due the Pittsburgh Construction Company for work done and materials furnished under the contract, which were submitted to James H. McRoberts, who, after a full hearing, rendered an award in favor of the Pittsburgh Construction Company, in the sum of $332,-750.98.

The Pittsburgh Construction Company then brought an action against the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, on their contract of guaranty, for the amount of the award, with interest, in the Circuit Court of the United States for the Western District of Pennsylvania, at No. 30 May Term, 1906, and a verdict was rendered in this suit, in favor of the Pittsburgh Construction Company, for the full amount.

The West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall by their counsel, made a motion, under an Act of Assembly of the Commonwealth of Pennsylvania for judgment non obstante veredicto, and on this motion, the Court entered the following judgment: *"Judgment will, therefore, be entered in favor of the defendant, non obstante veredicto; but such judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed."*

From this judgment the Pittsburgh Construction Company took a writ of error to the United States Circuit Court of Appeals for the Third Circuit, and, after argument, the

judgment of the Circuit Court of the United States for the Western District of Pennsylvania was affirmed. Judge Holland delivered the opinion of the Circuit Court of Appeals. He said in this opinion, that there were eight matters of defence set up by the defendants at the trial of the case in the Circuit Court, none of which were considered by the learned Judge of the Court below, on the motion for judgment non obstante veredicto, except the first, to wit: That the contract was void because it was executed before the Pittsburgh Company was registered in Pennsylvania.

By an Act of Assembly of the Commonwealth of Pennsylvania, approved May 23, 1907, P. L. 205, it was provided, that contracts made by a foreign corporation should be binding upon the parties thereto, and said corporation might enforce the same in the courts of that Commonwealth, provided, that such corporation had subsequently, and prior to the passage of the Act, complied with the laws of the Commonwealth, by establishing a known place or places of business, and designated an authorized agent or agents for the transaction of its business within the same, and, provided, that before commencing any suit upon such contract, bond, or obligation, it had paid all taxes that would have accrued to the Commonwealth of Pennsylvania if it had complied with the laws of that Commonwealth at the time of beginning to do business therein.

After the passage of that Act, the Pittsburgh Construction Company brought the suit at bar against the West Side Belt Railroad Company in the Court of Common Pleas No. 4 of the County of Allegheny and Commonwealth of Pennsylvania, at No. 398 Fourth Term, 1907, and filed a declaration therein containing two counts:- one for the recovery of the sum of $332,750.98, with interest, for services performed and materials furnished, conclusively evidenced by the award of James H. McRoberts; and the other upon a quantum meruit,

for the value of the work done and materials furnished, as of the date of the performing and furnishing the same.

The West Side Belt Railroad Company pleaded in this suit, among other things, that the Pittsburgh Construction Company had brought a former suit against the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, in the United States Circuit Court for the Western District of Pennsylvania, at No. 30 May Term, 1906, for the same matters and things sued for in this case and in that action, sought to recover from the West Side Belt Railroad Company on the same contract, and judgment had been entered in favor of the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, which judgment, it averred, adjudicated all matters in controversy, in this suit and all claims which the Pittsburgh Construction Company had the right to present at the trial thereof upon the contract and upon the award of James H. McRoberts, or otherwise.

At the trial the Court of Common Pleas No. 4 directed a verdict in favor of the plaintiff and decided that the judgment in favor of the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, entered in the Circuit Court of the United States for the Western District of Pennsylvania, at No. 30 May Term, 1906, was not a bar to the action brought by the Pittsburgh Construction Company against the West Side Belt Railroad Company, in that Court. Judgment was then entered on the verdict, and an appeal taken by the West Side Belt Railroad Company and its Receivers to the Supreme Court of Pennsylvania, at No. 132 October Term, 1909, and the judgment of the Court of Common Pleas No. 4 of Allegheny County was affirmed by the Supreme Court of Pennsylvania. Mr. Justice Stewart rendered the opinion affirming the judgment. In this opinion, he gave due effect to the judgment of the Circuit Court of the United

States for the Western District of Pennsylvania, but held that the judgment of the Circuit Court of the United States clearly disclosed that it was not based upon the merits of the case, but was based exclusively upon the Pittsburgh Construction Company's disability to maintain the action, because of its failure to register within the State of Pennsylvania before the contract sued upon was entered into, and that the Judgment of the Circuit Court of the United States expressly reserved to the Pittsburgh Construction Company the right to sue for services performed.

Statement of the Law.

THERE IS NO SUCH FEDERAL QUESTION INVOLVED IN THE CASE AT BAR AS WILL GIVE THIS COURT JURISDICTION.

This is an action brought by the Pittsburgh Construction Company against the West Side Belt Railroad Company as principal debtor, to recover $332,756.98 with interest, awarded by James H. McRoberts, the Arbiter, for services performed and materials furnished.

This suit was brought after the passage of the Act of Assembly of the Commonwealth of Pennsylvania, approved May 23, 1907, P. L. 205, which gave a foreign corporation the right to enforce contracts, made prior to registration, in the courts of that Commonwealth, provided that such corporation had complied with the laws of the Commonwealth by establishing a known place or places of business, and designated an authorized agent for the transaction of its business within the Commonwealth; provided that before commencing any suit upon such contract, bond or obligation, it had paid all taxes that would have accrued to the Commonwealth if it had complied wth the laws thereof at the time of beginning to do business therein.

It was not disputed that the Pittsburgh Construction Company had complied with all of the provisions of this Act.

The West Side Belt Railroad Company and its Receivers pleaded to this action that the judgment in favor of the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall in the case of the Pittsburgh Construction Company against them, upon their contract guaranteeing the payment of all monies becoming due under the contract of May 24, 1901, in the Circuit Court of the United States for the Western District of Pennsylvania, was an adjudication of all matters and things in controversy in this case which the Pittsburgh Construction Company had the right to present at the trial upon the contract and the award of James H. Mc-Roberts, or otherwise.

The answer of counsel for the Pittsburgh Construction Company to this contention was that the judgment in the Circuit Court of the United States was not rendered upon the merits, and was not between the same parties and for the same right of action, and that the judgment of the Circuit Court of the United States expressly reserved to the Pittsburgh Construction Company the right to maintain a subsequent suit or proceeding for services performed, and the award of James H. McRoberts was conclusive of the amount of services so performed.

The Supreme Court of Pennsylvania held that the judgment in the United States Circuit Court was rendered not on the merits of the case, and that the present suit was for services performed, and therefore within the reservation in the judgment of the United States Circuit Court.

WHAT WAS DECIDED IN THE CIRCUIT COURT OF THE UNITED STATES.

The Hon. Joseph Buffington who presided at the trial of the case in the Circuit Court of the United States for the Western District of Pennsylvania, in his opinion on the motion for Judgment, notwithstanding the verdict in favor of the Pittsburgh Construction Company, the plaintiff therein, says:

> "The plaintiff had not been registered. It subsequently did register on June 15, 1901. Permission to a foreign corporation to transact business in a state is subject to state legislation when exercised within reasonable limits, and where the highest courts of the state have construed the statutes granting such permission, the Federal Courts follow such construction: McCanna & Company v. Citizens Company, 76 Fed. Rep. 420. Now, in Lasher v. Stimson, 145 Pa. St. 30, in speaking of the requirements of registration of the act of 1874, the Supreme Court held: 'These terms are not onerous or in conflict with any constitutional provision or rule of public policy. But they are clearly prohibitory, and they indelibly stamp as unlawful any business transaction within the state by a foreign corporation which has not complied with them. It is only by its observance of them that it can have a legal existence for business purposes within the jurisdiction, or acquire contractual rights which our courts will recognize.' This decision was made in 1891, and was declared law of the state when the contract between Petrie and the plaintiff was made in 1901. The decision in Delaware, etc. Company v. Passenger Railway Company, 240 Pa. St. 25, follows in 1902. This decision shows adherence by the Supreme Court to the construction originally given the act in Lasher v. Stim-

son. 'The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made, can give it a right of action. Any other construction of the act would violate its plain words, and wholly defeat its object by affording protection to the corporation and denying it to the public.' On May 24th, 1901, when the plaintiff, a foreign corporation, made this contract, it had not been registered. It therefore, had no right under the statutes to make it, and in doing so its officers and agents made themselves liable to a criminal prosecution with fine and imprisonment. * * * *

If, then, the contract between Petrie and the plaintiff was illegal, and intended to secure the performance by the plaintiff of unlawful acts, how can this action on the guarantee given by the defendants be enforced. That guarantee was an undertaking on their part to pay the plaintiff a consideration for doing the unlawful thing provided for in the contract. It is clear that an action on the guarantee cannot be sustained without disclosing the guaranteed contract or performance if its prohibitory acts are the foundation of a recovery against the guarantors. * * * *

Upon the whole, therefore, we are of opinion that by reason of the nonregistration of the plaintiff corporation prior to the contract here involved, the verdict for plain-

tiff cannot be sustained. Judgment will therefore be entered in favor of the defendant non obstante veredicto; *but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed.*"

From this judgment, the Pittsburgh Construction Company, took a writ of error to the United States Circuit Court of Appeals for the Third Circuit, and, quoting from the case of *Delaware, etc. Company v. Passenger Railway Company*, 204 Pa. St. 22, Judge Holland, who delivered the opinion of the Court affirming the Court below, says:

" 'The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made, can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object by affording protection to the corporation and denying it to the public.'

The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the plaintiff must rely upon its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends upon whether it requires the aid of an illegal transaction to establish the case, and, if it be necessary to prove the illegal contract in order to maintain the action, the Courts will not enforce it, nor will they enforce any alleged

rights springing from such agreements, *Johnson v. Hulings, supra*: *McMullen v. Hoffman*, 174 U. S. 639, 19, Sup. Ct. 839, 43 L. Ed. 1117."

It appears from an examination of these opinions, that the judgment was based exclusively upon the inability of the Pittsburgh Construction Company to enforce a contract made prior to its registration, although the amount which it claimed was for work performed and materials furnished after the date of the registration. *The contract was dated May 24, and the Construction Company was registered on June 15, 1901.*

WHAT WAS DECIDED IN THIS CASE BY THE COURT OF COMMON PLEAS NO. 4, OF ALLEGHENY COUNTY, PENNSYLVANIA AND THE SUPREME COURT OF PENNSYLVANIA.

The Hon. Joseph M. Swearingen, President Judge of the Court of Common Pleas No. 4 of Allegheny County, before whom this case was tried, filed an opinion upon the motion of counsel for the West Side Belt Company and its Receivers, for judgment in their favor *non obstante veredicto*. He says:

"In considering the effect of the judgment in the United States Court, we disregard the form in which that action was brought and the facts, that more parties than the defendant were sued and that the action was apparently one against guarantors. We assume, for the purposes of this consideration, that said action was between the same parties and upon the same cause as this one. Does then the said act of May 23rd, 1907, revitalize the contract, which the United States Court declared invalid?

The power of the Legislature to pass retroactive or curative acts cannot be disputed. *Donley v. Pittsburgh;*

147 Pa. 348. That such statutes may be enacted and enforced, even after adjudication of contracts in the Courts, seems to have been decided in a number of cases. *Watson v. Mercer*, 8 Peters, 876; *Hess v. Werts*, 4 S. & R. 356, *Satterlee v. Matthewson*, 16 S. & R. 169; *Mercer v. Watson*, 1 Watts 330. The only question then is, whether or not the said Act of May, 23rd, 1907, indicates that the intention was to render valid a contract, upon which suit had already been and the contract judicially determined to be invalid. It seems to us that the language of this Act is sufficient to indicate such a purpose. It legalizes 'any contract, bond or obligation' of any corporation under the laws of another state, 'doing business in this state, without first having complied with the laws of Pennsylvania relative thereto, with the proviso that such corporation must have complied with the laws of Pennsylvania, prior to the passage of said statute, and must have paid all taxes that would have accrued. The Act makes no distinction between contracts which have been, and those which have not been, litigated. As before stated, this plaintiff has complied with all the requirements of this Statute. We are of opinion that the said Act has cured the defect in the plaintiff's contract, and consequently the said judgment is not a bar to this action."

Mr. Justice Stewart delivered the opinion of the Supreme Court of Pennsylvania. He says:

"The court held that the present action was not barred by the judgment in the circuit court. We are of opinion that the ruling was correct. We may concede that so far as concerns the appellant here the parties were the same, and that the cause of action was the same in both suits, but it remains true nevertheless that the ad-

judication of the Circuit Court of the United States was not on the merits of the case. The judgment there clearly and certainly discloses this much. It is based exclusively on the plaintiff's disability to maintain the action because of its failure to register within the state before the contract sued upon was entered into; it expressly reserves to the plaintiff the right to sue for services performed. 'The judgment must be upon the merits; if the real merits of the action are not decided in the prior judgment, it is no bar. Herman on Estoppel, 278. Our own cases have uniformly recognized the doctrine here asserted. In *Carmony v. Hoober*, 5 Pa. 305, it is said: 'The maxim which forbids a second judicial agitation of *rem adjudicatam* by the same parties or their privies, is one of essential consequence in its application, and therefore to be rigidly adhered to within the bounds that have been assigned to it. But we think it has never been carried to the verge to which the learned judge before whom the cause was tried has pushed it in the present instance. On the contrary, it has been held an acknowledged principle, that when it can be gathered from the record, the merits of the controversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit; for, as was observed by a very eminent jurist, in such case the argument that the causes of action were the same is virtually negatived. (Per Story, J., in *Hughes v. Blake*, 1 Mason, 515.) This exception to the maxim invoked by the defendant in error, if indeed it can strictly be called an exception, since it assumes the character of a general rule, is almost, if not altogether, coexistent with the rule itself. * * * *

The rule is the same if the first cause went off because the Court had not jurisdiction, or because the debt or duty sued for was not then due: *Estill v. Taul*, 2 Yerg. 467,470; or, as was determined by this court in *Kane v. Fisher*, 2 Watts 253, where the record shows that part of a demand, consisting of several articles capable of being separated, was not due, though counted for at the time of suit brought. But approaching somewhat nearer to the precise point presented for adjudication by the case at bar, it will be found that when it appears the first suit was prematurely commenced no advantage can be taken of a judgment rendered therein against the plaintiff, unless indeed it be shown the parties waived the irregularity and consented to an investigation of merits. Thus it has been correctly decided that a judgment rendered in favor of the defendant, in an action against the indorser of a promissory note, brought before notice given, cannot be set up as a bar to a second action after notice, because it is apparent that in the first suit the plaintiff had no cause of action: *New England Bank v. Lewis*, 8 Pick. 113. Many similar cases might be cited, all proceeding on the ground that where the merits of the second suit were necessarily excluded in the former, the plaintiff ought not to be barred. Indeed, a contrary rule would be founded in such rank injustice as to be insupportable, and had such an one been even entertained in the earlier ages of the law, when reason and truth were but too often made to give way before the fancied force of technical subtleties and hairdrawn distinctions, it must long since have succumbed to the enlightened wisdom which tolerates litigation only as a means of administering uniform justice.' In Coleman's Appeal, 62 Pa. 252, it is said by Sharswood, J.: 'Whenever a judgment is relied on for

this purpose, it is competent for the adverse party to show that the particular point was not adjudicated, if in law, it could have been rendered upon any other. * * * * The principle is well stated by Mr. Justice Nelson in *The Packet Company v. Sickles*, 5 Wallace S. C. Rep. 592: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered to have settled that matter as to all future actions between the parties; and further, in cases in which the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact, but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be conclusive." ' *Haws v. Tiernan*, 53 Pa. 192; *Follansbee v. Walker*, 74 Pa. 306; *Weigley v. Coffman*, 144 Pa. 489, are among our own cases which are to the same effect. The prior adjudication settled nothing with respect to the merits of this case; all that was there adjudicated was the plaintiff's right to maintain its action as an unregistered foreign corporation. Wherein does the present case differ from the case of *Bank v. Lewis*, 8 Pick. 113, approvingly cited

by Bell, J., in *Carmony v. Hoober, supra,* in which it was held that a judgment rendered in favor of a defendant in an action against the indorser of a promissory note brought before notice given, cannot be set up as a bar to a second action after notice, because it was apparent that in first suit plaintiff had no cause of action? The case of *Roney v. Westlake,* 216 Pa. 374, so much relied upon by appellant's counsel as sustaining a different view, conflicts in no respect with the cases we have cited. That case decided that a verdict and judgment in favor of a defendant in an action on a promissory note which was not stamped with an internal revenue stamp is *res judicata* as to a subsequent action between the same parties on the same note after a revenue stamp had been placed thereon. The ground on which the decision was rested was that in the first action because of express provision in the act of Congress disqualifying unstamped instruments as matters of evidence, the note itself not being admissible, the plaintiff was without competent evidence to establish his claim, and having submitted his claim to the jury and permitted a verdict and judgment to go against him, he was concluded because the verdict was the result of failure to establish the claim by competent evidence. Our Brother Mestrezat, in his opinion in that case, clearly marks the distinction that is to be observed. He says: 'The case in hand must be distinguished from that class of cases where the judgment set up in bar of the second action is not upon the merits of the question involved in litigation. Those cases are where the judgment is founded upon a lack of jurisdiction, a nonjoinder or misjoinder of parties, plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleadings, or the like.

Am. & Eng. Ency. of Law (2d ed.), 794, or where the suit is discontinued, the plaintiff becomes nonsuit, the debt is not yet due, or there is a temporary disability of the plaintiff to sue: 1 Greenleaf on Evidence, secs. 529, 530; *Weigley v. Coffman*, 144 Pa. 489. Judgments in those cases are not obtained upon the merits, and hence are not a bar to another action.' The effect of the Act of 23 May, 1897, was to remove the impediment created by the prior act to the enforcement of the contract, and the plaintiff at once acquired the right to maintain an action thereon."

THE SOLE QUESTIONS INVOLVED IN THE SUIT IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA AND IN THIS SUIT RELATE EXCLUSIVELY TO THE CONSTRUCTION OF A STATE STATUTE, PASSED FOR THE PROTECTION OF THE CITIZENS OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE DECISION OF THE STATE COURTS THEREON IS CONCLUSIVE.

In *Miller Exec. vs. Anderson*, 150 U. S. 132, it is held: That the construction of a state statute is a matter for the state court, and its determination thereof is binding on this Court.

THE SUPREME COURT OF PENNSYLVANIA GAVE THE SAME EFFECT TO THE JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA, WHEN IT WAS PLEADED IN BAR OF THIS ACTION THAT IT WOULD HAVE GIVEN TO A JUDGMENT OF A COURT OF ITS OWN STATE.

There was no attempt on the part of the Supreme Court of Pennsylvania, or of the Court of Common Pleas No.

4 of Allegheny County, to deny the validity of or give due effect to the judgment entered in the Circuit Court of the United States for the Western District of Pennsylvania, and they gave it the same effect as though it had been rendered in a state court. Mr. Justice Stewart, in his opinion, cites authorities, not only from the Pennsylvania decisions, but from the decisions of the Supreme Court of the United States and from the Courts of other states.

In the case of the *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. vs. Long Island Loan and Trust Co.*, 172 U. S. 493-516, Mr. Justice Harlan says:

> "It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States, rendered in such a case under such circumstances, than is due to the judgments of the State courts in a like case and under similar circumstances. If by the laws of the state, a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judgment of the Circuit Court, thus brought in question, would have had the effect of binding and concluding Rochereau if it had been rendered in a state court."

In *Hancock National Bank vs. Farnum*, 176 U. S. 640:

> "The fact that this judgment was rendered in a court of the United States, sitting within the State

of Kansas, instead of one of the state courts, is immaterial. * * * * It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state are to be accorded such effect, *and such effect only*, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority."

SUMMARY.

(1) The suit at bar was brought by the Pittsburgh Construction Company against the West Side Belt Railroad Company, to recover the amount found by James H. McRoberts, in his award, to be owing for work done and materials furnished in the building of the road of the Railroad Company, under the contract of May 24, 1901. This suit was brought subsequent to the passage of the Act of Assembly of the Commonwealth of Pennsylvania, approved May 23, 1907, P. L. 205.

(2) The West Side Belt Railroad Company pleaded to the suit at bar the judgment entered in an action by the Pittsburgh Construction Company against the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, at No. 30 May Term, 1906, of the Circuit Court of the United States for the Western District of Pennsylvania, upon a contract of guaranty made by the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, wherein they guaranteed and became surety for the payment of the money mentioned in the contract of May 24, 1901, as the same became due and payable. This judgment was based exclusively upon the ground that the contract of May 24, 1901, at the date of the bring-

ing of the suit in the United States Circuit Court was not enforceable, *but it reserved expressly to the Pittsburgh Construction Company the right to bring a suit for services performed.*

(3) The Supreme Court of Pennsylvania determined that the judgment in the Circuit Court of the United States was not decided upon the merits of the case, and that the suit at bar was within the terms of the reservation giving to the Pittsburgh Construction Company the right to maintain the suit at bar for services performed.

(4) The judgment in the Circuit Court of the United States for the Western District of Pennsylvania could not properly be pleaded in bar of this suit because it was not rendered (a) upon the merits, (b) upon the same cause of action (c) between the same parties, (d) the right of the Pittsburgh Construction Company to sue for services performed was expressly excluded therefrom.

(5) The action brought by the Pittsburgh Construction Company against the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall, involved solely the construction of the Act of Assembly of the Commonwealth of Pennsylvania, approved April 22, 1874, P. L. 108, which prohibited a foreign corporation from doing any business in the Commonwealth until it had first registered as provided by the Act, and involved no controversy arising under the Constitution, laws or treaties of the United States.

(6) In the action at bar there was no denial of the validity of the judgment in the Circuit Court of the United States. The Court of Common Pleas No. 4 and the Supreme Court of Pennsylvania gave it the same force and effect that they would have given it had it been rendered in a state court. The only question involved was whether the judgment in the United States Circuit Court consti-

tuted a bar. The Supreme Court of Pennsylvania determined the question upon principles of general law, and cited not only decisions rendered by the Courts of the Commonwealth of Pennsylvania, but by the Courts of other states and of the United States.

THE WRIT OF ERROR IN THE SUIT AT BAR IS FRIVOLOUS AND THERE IS NO REAL FEDERAL QUESTION INVOLVED.

An examination of the opinions of the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania will show that the federal question is a frivolous and fictitious one.

> "A real, and not a fictitious, Federal question is essential to the jurisdiction of the Supreme Court over the judgment of a State court."
>
> *Millingar vs. Hartupee*, 6 Wall. 258.
>
> *New Orleans v. New Orleans Water Works*, 142 U. S. 79.

In *Spies vs. Illinois*, 123 U. S. 131, the Chief Justice said:

> "It is our duty to ascertain not only whether any question reviewable here was made and decided in the proper court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion, the writ ought not to be allowed by the Court if it appears from the face of the record that the decision of the federal question which is complained of, was so plainly right as not to require argument, and especially if it is in accord-

ance with our own well considered judgments in similar cases."

In *In re Kemmler*, 136 U. S. 438, the decision in *Spies v. Illinois* was re-affirmed.

IF THIS WRIT OF ERROR IS NOT DISMISSED, THE JUDGMENT OUGHT TO BE AFFIRMED UPON THE PRESENT MOTION.

"A color for a motion to dismiss, where the claim of a Federal question is not so clearly superfluous as to authorize its dismissal, may be sufficient to permit the Court to proceed to the consideration of the question involved, where, with the motion to dismiss, was a motion to affirm on the ground that the writ of error was taken merely for delay."

Douglass v. Wallace, 161 U. S. 346;

Lowry v. Silver City Gold and Silver Mining Co., 179 U. S. 196;

Capital City Dairy Co. v. Ohio, 183 U. S. 238.

In considering the motion to affirm, the sole question to be determined by your Honors is, whether the Supreme Court of Pennsylvania gave to the judgment of the Circuit Court of the United States for the Western District of Pennsylvania, when it was pleaded in bar, the same effect that it would have given a judgment of a court of that state. The matter is so fully discussed in the opinion of that Court, rendered by Mr. Justice Stewart and printed in the record, that we feel it is unnecessary to add anything.

EDWIN W. SMITH,
SAMUEL MCCLAY,
Counsel for Defendant in Error for the purposes of these motions.

AN ACT

Validating contracts, bonds, or obligations made by corporations of other States, without first having established known places of business and designated authorized agents for the transaction of their business within this Commonwealth, and providing for the enforcement of the same.

SECTION 1. Be it enacted, &c., That whenever any corporation organized and existing under the laws of any other State, and doing business within this Commonwealth, shall have heretofore entered into any contract, bond, or obligation with any person, firm, or corporation, without having first established a known place or places of business and designated an authorized agent or agents for the transaction of its business in this Commonwealth, the said contract, bond, or obligation shall be binding upon the parties thereto, and such corporation may enforce the same in the courts of this Commonwealth: Provided, That it has subsequently, and prior to the passage of this act, complied with the laws of this Commonwealth by establishing a known place or places of business and designating an authorized agent or agents for the transaction of its business within the same: And, provided, further, That it shall, before commencing any suit upon such contract, bond, or obligation, it shall pay all taxes that would have accrued to the Commonwealth of Pennsylvania if it had complied with the laws of Pennsylvania at the time of beginning to do business therein.

SECTION 2. All acts, or parts of acts, in so far as they are inconsistent with the provisions of this act, are hereby repealed.

APPROVED—The 23d day of May, A. D. 1907.

EDWIN S. STUART.

P. L. 205.

IN THE

Supreme Court of the United States

No. 681 October Term, 1910.

West Side Belt Railroad Company, and Francis H. Skelding and Henry W. McMasters, Receivers, Plaintiffs in Error,

vs.

Pittsburgh Construction Company, Defendant in Error.

The Reply of the Defendant in Error to the Argument of the Plaintiff in Error upon Motion to Dismiss the Writ and Affirm the Judgment.

EDWIN W. SMITH,
SAMUEL McCLAY,
Counsel for defendant in error for the purposes of these motions.

Pittsburgh Printing Company.

IN THE

Supreme Court of the United States

No. 681 October Term, 1910

WEST SIDE BELT RAILROAD COMPANY, and FRANCIS H. SKELDING and HENRY W. MCMASTERS, Receivers,
Plaintiffs in Error

vs.

PITTSBURGH CONSTRUCTION COMPANY,
Defendant in Error.

The Reply of the Defendant in Error to the Argument of the Plaintiff in Error upon Motion to Dismiss the Writ and Affirm the Judgment.

There is but one error assigned in this case, that the Supreme Court of Pennsylvania erred in not giving force and effect to the judgment of the United States Circuit Court in and for the Western District of Pennsylvania.

The exact language of the assignment is as follows:

> "The Supreme Court of Pennsylvania erred in not giving force and effect to the judgment of the United States Supreme Court in and for the Western District of Pennsylvania (affirmed by the United States Supreme Court of Appeals in and for the Fifth Circuit at No. ..... March Term, 1907) which was rendered in a

suit at No. 30 May Term, 1906, between the same parties upon the same cause of action, and was a judgment for the Defendant, which judgment was set up by the Receivers of the Defendant, in this suit as a bar to this suit, the Supreme Court of Pennsylvania thus having denied the validity of an authority exercised under the laws of the United States, to-wit: The validity of a judgment of the said United States Circuit Court (as affirmed by the United States Circuit Court of Appeals). This case therefore involves a federal question, to-wit: The force and effect of a judgment of a United States Circuit Court when plead in a state court between the same parties and upon the same cause of action."

It is stated in this language:- "The opinion of Judge tion to dismiss was confined to this assignment of error. We assumed that there was no other question before this Court, and while this question is argued in the reply of the Plaintiffs in Error, the main argument is devoted to a question that is not assigned as error at all.

It is stated in this language:- The opinion of Judge Swearingen of the Common Pleas Court, however, puts the case squarely upon the position that the Act of May 23, 1907, practically created a new and valid cause of action which had never been passed upon by the United States Court, and consequently could be recovered upon without any disturbance of a federal judgment. (Record, page 69). *This it appears to us is the real question in the case.* We submit that all minds will agree that had the Act of May 23, 1907, not been passed, no fresh suit would have been brought upon the contract which had been declared invalid by the United States Circuit Court, and had such suit been brought no Court would have considered it for a moment. The suggestion that the decision of the United States Court was not on the merits, or that the

reservation to the plaintiff in that judgment of the right to sue on a *quantum meruit* gave it the right to sue again upon the discredited contract seem to us only to tend to becloud the issue, and draw the mind into fanciful discussions."

This argument compels us, we think, to make a brief reply. When the suit was brought in the Court of Common Pleas of Allegheny County, from which this appeal was taken, the plaintiff was in this situation. The Act of May 23, 1907, had been passed, permitting such a contract to be sued upon in the State Court. In the suit brought in the Circuit Court of the United States for the Western District of Pennsylvania, Judge Buffington denied the right to recover, but had specifically saved the right to proceed for services rendered. Apparently, then, the Pittsburgh Construction Company had two rights to recover some amount of money which was due to it from the Railroad Company for the construction of its road; the first upon the contract under the statute, the second upon the *quantum meruit*. It seemed a sensible thing, therefore, to file the statement of claim in two counts, and this was done.

Upon the trial the Court held that under the statute the contract gave a right of recovery in the state courts, and admitted the evidence offered by the plaintiff of the contract and the subsequent award of the Chief Engineer of the Railroad Company based upon this contract. The plaintiff, however, did not rest its case here, but proceeded to make an offer to prove the value of the services rendered, and this offer, with the objections of the learned counsel, appears in the record as filed in this court, was not printed for the purpose of this motion, but is printed herewith as an appendix.

It is to be noted that upon this offer to prove the value of the services rendered, the counsel objected, and his objection was sustained.

The ready answer and explanation will be that if the plaintiff saw fit to stand upon the contract and upon the award, the offer to prove the *quantum meruit* was quite inconsistent, and that an objection was proper. But this is only an apparent answer, because, as the record in the case below discloses, the counsel for the defendant had objected to the offer of the contract and the award. He had made his record for review in an Appellate Court. Manifestly if the award was not the measure of the services in this case the plaintiff had a right to prove the value thereof. How then does this bear upon the argument of the Plaintiffs in Error in their reply brief?

The first and second reasons given by the counsel in their objection to the offer are set forth in the appendix, and are as follows:

> First, the contracts upon which this work was done and materials furnished are in writing, are attached to the plaintiff's Statement of Claim and are sued on in this case. These contracts show a relation, first, between the railroad company and one Petrie, and, second, between Petrie and the plaintiff company, which is inconsistent with an implied contract from the defendant company to the plaintiff company.
>
> Second, the contracts which are sued on in this case, copies of which are attached to the plaintiff's Statement of Claim, contain the provision for payment of amounts earned thereunder only upon certificate of the chief engineer, the language of the contract being, 'it being expressly understood that such final estimate and certificate of the chief engineer shall be conclusive upon the parties'. The said contracts, further providing that any question or dispute should be determined by the chief engineer as final arbitrator, and the language of the contract pro-

vides: 'And each and every of said parties do hereby waive any right of action, suit or suits or other remedy at law, or otherwise, by virtue of said covenants, so that the decision of the said chief engineer, James H. McRoberts, shall be in the nature of an award, to be final and conclusive on the rights and claims of said parties.' The provision thus made in the contracts is necessarily a condition precedent to recovery and the plaintiff cannot claim under said contracts or in connection therewith any other measure of damages or any other valuation than that fixed in the contracts, as above indicated, and ascertained in the manner set forth in the said contracts."

The position assumed in this first reason is that, having made a written contract, though void, there can be no implied contract for payment for services rendered. This is clearly shown in the third reason: "Third, that while it is true, as stated in the offer, that the validity of said contracts necessarily remains as the evidence of the intention of the parties at the time same were made and show conclusively that there was no implied contract upon which a *quantum meruit* could be sustained."

The position assumed in this second reason is that the award of the engineer is conclusive and "is necessarily a condition precedent to recovery," and yet there can be no recovery because the contract is void.

Having made these objections, giving these reasons for the objections, in this case at bar, can the Plaintiffs in Error safely argue that the Act of 1907 impaired the obligation of the contract?

We assert that the obligation of the contract here sued on was not impaired by the Act of 1907. We quote the words of Mr. Justice Washington in the case of *Satterlee vs. Mat-*

thewson, 2 Peters 380, which we find in the brief of the Plaintiffs in Error:- "It is not easy to perceive how a law, which gives validity to a void contract, can be said to impair the obligation of that contract."

The contractor had the right to recover for services rendered. This statute permitted it only to recover for those services upon the basis of the prices agreed upon by the parties, fixed by the contract; permitted it only to recover the amount found by the chief engineer, sitting as an arbitrator, under the contract, whose arbitrament was invoked by the Railroad Company and whose decision has not been challenged, except upon the question of a claim of damages for delay in completion, which claim he denied.

The decision of the Circuit Court was given full effect—the broadest possible. It was assumed by everybody upon the second trial that without the Act of 1907 there could be no recovery on the contract—that the case had been adjudicated. The effect of the Act of 1907, was not a Federal question, it was solely one for the state courts.

THE CURATIVE ACT OF MAY 23, 1907 OF THE PENNSYLVANIA LEGISLATURE IS CONSTITUTIONAL.

Whenever legislative acts validating contracts "go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through some neglect, or some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power."

Cooley's Constitutional Limitations, 7th Ed., 535.

In *Mercer v. Watson*, 8 Peters 876, Mr. Justice Story says:

> "It is clear that this Court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property."

And in the same case, in the Supreme Court of Pennsylvania, reported in 1st Watts, 358, Chief Justice Gibson says:

> "In *Satterlee v. Matthewson*, 16 S. & R. 169, a void lease was validated by a statute, which was determined to be constitutional, though operating in the particular instance on a case adjudicated. * * * *
>
> Even Mr. Justice Johnson, who dissented as to that, concurred in maintaining the competency of the legislature to declare the law retrospectively, so as to revise and overrule the decisions of the judiciary, a principle broad enough to cover the whole case."

In *Randall v. Krieger*, 90 U. S. 137-150, Mr. Justice Swayne says:

> "Nor was the act forbidden by the Constitution of the United States. There is nothing in that instrument which prohibits the Legislature of a State or Territory from exercising judicial functions, nor from passing an act which divests rights vested by law; provided, its effect be not to impair the obligation of a contract. Contracts are not impaired, but confirmed, by curative statutes, *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 110 * * * To the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. * * * *

Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party."

To the same effect are:

Gross v. Mortgage Co., 108 U. S. 477-488;
Rosenplanter v. Provident Savings Life Assurance Society, 96 Fed. Rep. 721;
Cooley's Constitutional Limitations, 7th Ed. pp. 538, 539;
Hess v. Werts, 4 Sergeant & Rawle, 356.

THE JUDGMENT IN THE CIRCUIT COURT OF THE UNITED STATES IS RES ADJUDICATA ONLY OF THE ISSUES THEN PRESENTED, OF THE FACTS AS THEY APPEARED, AND OF THE LEGISLATION EXISTING AT THE RENDITION OF THE JUDGMENT IN THE COURT BELOW.

In *Utter v. Franklin*, 172 U. S. 417, it is held that "a judgment holding bonds invalid is not res judicata as to their validity after a subsequent statute has cured their defect."

Mr. Justice Brown says:

"The fact that this Court had held the original Pima county bonds invalid, does not affect the question. They were invalid because there was no power to issue them; they were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was res judicata only of the issues then presented, of the facts as they then appeared, and of the legislation then existing."

To the same effect are the Pennsylvania cases of:

Barnet v. Barnet, 15 Sergeant & Rawle, 71;
Mercer v. Watson, 1st Watts 356;
Land Co. v. Weidner, 169 Pa. St. 364.

EDWIN S. SMITH,
SAMUEL MCCLAY,
Counsel for defendant in error for the purposes of these motions.

APPENDIX.

February 17th, 1909.

H. J. Wurneburg, recalled.

H. J. Wurneburg, recalled, testified as follows:

Direct examination by Mr. Smith:

Q. Mr. Wurneburg, you stated yesterday that you had been in charge of the work from the beginning and had full charge for some time and that later you had charge of one of the sections of the railroad?

A. Yes, sir.

Q. And that was the outer section, was it, from Castle Shannon?

A. Castle Shannon to Bruce.

Q. Are you familiar with the work that was done by the Pittsburgh Construction Company upon the line of this road from the beginning to the end?

A. Yes, sir.

Q. Will you state in a general way what the work was that was done by the construction company?

By Mr. Patterson: Objected to as incompetent and irrelevant. Counsel for the defendant suggest that plaintiff's counsel make an offer to show the relevancy of this question and line of proof.

By Mr. Smith: The Affidavit of Defense raising the question of the validity of the contract and the award made thereon, and averring that the rights thereunder had been adjudicated by the Circuit Court of the United States for the

Western District of Pennsylvania, counsel for plaintiff now propose to prove by the witness on the stand and other witnesses to follow him, and also by other competent evidence, that the Pittsburgh Construction Company, plaintiff, furnished materials and performed work and labor in the construction of the railroad of and for and at the instance of the West Side Belt Railroad Company, the defendant; and, further, to show by this witness and other witnesses and other competent evidence the cost of said construction and the value of the materials furnished and the work and labor done by the plaintiff for the defendant. The purpose of the offer being to fix the liability of the defendant under the averment in the Affidavit of Claim "that the materials furnished and the work and labor done and performed by the plaintiff were so done and performed for the defendant at its special instance and request".

By Mr. Patterson: Counsel for the defendant object to the offer for the following reasons:

First, the contracts upon which this work was done and materials furnished are in writing, are attached to the plaintiff's Statement of Claim and are sued on in this case. These contracts show a relation, first, between the railroad company and one Petrie, and, second, between Petrie and the plaintiff company, which is inconsistent with an implied contract from the defendant company to the plaintiff company.

Second, the contracts which are sued on in this case, copies of which are attached to the plaintiff's statement of claim, contain the provision for payment of amounts earned thereunder only upon certificate of the chief engineer, the language of the contract being, "it being expressly understood that such final estimate and certificate of the chief engineer

shall be conclusive upon the parties". The said contracts, further providing that any question or dispute should be determined by the chief engineer as final arbitrator, and the language of the contract provides: "And each and every of said parties do hereby waive any right of action, suit or suits or other remedy at law, or otherwise, by virtue of said covenants, so that the decision of the said chief engineer, James H. McRoberts, shall be in the nature of an award to be final and conclusive on the rights and claims of said parties." The provision thus made in the contracts is necessarily a condition precedent to recovery and the plaintiff cannot claim under said contracts or in connection therewith any other measure of damages or any other valuation than that fixed in the contracts, as above indicated, and ascertained in the manner set forth in the said contracts.

Third, that while it is true, as stated in the offer, that the validity of said contracts is attacked in the Affidavit of Defense, yet the said contracts necessarily remain as the evidence of the intention of the parties at the time same were made and show conclusively that there was no implied contract upon which a *quantum meruit* could be sustained, for the reason that the contracts were in writing and that the plaintiff company is a sub-contractor, under written contracts, the defendant being the principal, or owner, that consequently any claim of an implied contract is directly negatived by the written contracts attached to the plaintiff's Statement of Claim.

Fourth, the written contracts in this case sued upon by plaintiff, showing a clear contractual intent between the parties and that the plaintiff company assumes the position of sub-contractor under one Petrie, as original contractor, the same cannot be reformed, changed or modified so as to make the contractual relation an implied one between the defendant

company and the plaintiff direct, except upon proof of fraud, accident or mistake, which would justify the Court in reforming the contracts, in accordance with the real intent of the parties. No such offer being made, the attempt to introduce the proof called for in the present offer is a contradiction of the written contracts in the case, and is, therefore, incompetent.

Fifth, as generally incompetent and irrelevant.

By the Court: Objection sustained.

To which ruling of the Court counsel for plaintiff except.

Exception allowed and bill sealed.

By Mr. Smith: Counsel for the plaintiff rest.

Plaintiff rests.

IN THE

Supreme Court of the United States

No. 681 OCTOBER TERM, 1910.

WEST SIDE BELT RAILROAD COMPANY, FRANCIS H. SKELDING and HENRY W. McMASTER, Receivers, Plaintiffs in Error,

vs.

PITTSBURG CONSTRUCTION COMPANY, Defendant in Error.

Brief for Plaintiffs in Error in reply to Brief of Defendant in Error upon its motion to dismiss Writ of Error or affirm Judgment.

THOMAS PATTERSON,
Counsel for Plaintiff in Error.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh, Pa.

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BRIEF OF ARGUMENT.

Statement of Facts.

The Pittsburgh Construction Company, the present defendant in error, brought suit in the United States Circuit Court for the Western District of Pennsylvania, at No. 30 May Term, 1906, against the West Side Belt Railroad Company, John S. Scully and T. N. Barnsdall as guarantors of a contract for the construction of a railroad which the Construction Company had entered into with one A. S. Petrie. The basis of the suit was an award made under the contract by the engineer as arbitrator. The guarantors had a number of defenses to the award, and as to the contract itself

they defended on the ground that the plaintiff company was a foreign corporation, not registered in Pennsylvania at the time the contract was entered into. The Court did not consider the defenses to the award, as that was not necessary, the Court reaching the conclusion that the entire contract was illegal as made in contravention of the Act of Assembly of Pennsylvania, approved April 22, 1874, (P. L. 108), which provides, in the first paragraph, that "no foreign corporation shall do business in this Commonwealth until such corporation shall have established an office," etc., and in the second paragraph that "it shall not be lawful for any such corporation to do any business in the Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement * * * showing the title and object * * * the location of its business, and the name, or names, of its authorized agent." We give the full text of the act in our appendix. This conclusion was reached on a motion by the defendant for judgment *non obstante veredicto,* the Court entering the judgment prayed for by the defendant. In entering this judgment, the Court said "Judgment will therefore be entered in favor of the defendant *non obstante veredicto,* but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed."

This judgment was affirmed in terms by the United States Circuit Court of Appeals for the Third Circuit, that Court holding the contract sued on by the Construction Company absolutely void as within the prohibition of the statute above referred to. Both opinions are given in full in the record, pp..... The opinion of the Circuit Court of Appeals was handed down on July 17, 1907.

On May 23, 1907, an act of the Pennsylvania Legislature was approved, by which it was enacted that where

any foreign corporation had theretofore entered into any contract without having first established a place of business and designated an agent for the transaction of its business, "the said contract, bond or obligation shall be binding upon the parties thereto, and such corporation may enforce the same in the Courts of this Commonwealth." Provided that it had subsequently, and prior to the passage of the act, complied with the laws of the Commonwealth by establishing a place of business and designating an agent, and provided further that it should, before commencing any suit upon such contract, pay all taxes that would have accrued to the Commonwealth, if it, the corporation, had complied with the laws of Pennsylvania at the time of beginning to do business therein. The full text of the act will be found on page 25 of the brief of defendant in error in support of its motion to dismiss this appeal.

On August 1, 1907, the Pittsburgh Construction Company brought its suit against the West Side Belt Railroad Company in the Court of Common Pleas No. 4 of Allegheny County. This suit was upon the same contract that had already been sued upon and adjudicated in the proceeding in the United States Circuit Court at No. 30 May Term, 1906, as above described. There was, however, this difference in the form of the two proceedings. In the suit in the United States Circuit Court the Railroad Company was sought to be charged as a guarantor, together with two individuals, of the contract which was made out in the name of A. S. Petrie as original contractor. In the suit in the State Court the action as brought against the Railroad Company, or its Receivers, as sole defendant, the plaintiff averring that Petrie was merely the hand of the Railroad Company in making the contract, and that the Construction Company was in truth and fact the original contractor with the

Railroad Company. The apparent reason of this change in form is this:

Under what is known in Pennsylvania as the Resolution of 1843 (approved January 21, 1843, P. L. 367), it is provided that a contractor for the construction of a railroad shall have a lien for the unpaid portion of his contract price. The Supreme Court of Pennsylvania has held in

Hart's Appeal, 96 Pa. St. 355,

that such lien exists only in favor of the contractor, and not in favor of a sub-contractor or material man.

Subsequent to the bringing of the original suit in the United States Circuit Court, the West Side Belt Railroad Company passed into the hands of Receivers. In order, therefore, to obtain a lien in the nature of a Mechanics' lien upon the property of the railroad, the Construction Company necessarily had to assume the position of an original contractor. This it did by averring that Petrie, in whose name the contract was made, was only a cover for the Railroad Company, as above set forth. In other respects the suit was the same and the contract sued upon was the identical contract of the former suit.

The Receivers of the Railroad Company interposed a number of defenses to this action, among which was the fact that this contract had already been sued on in the United States Court, and that judgment thereon had been rendered for the defendant, that the contract was the same, the parties the same, and there was the same cause of action. The former judgment they set up as a bar to the present action.

It should be said in passing, that the Construction Company, as an additional count to its suit on the contract,

claimed a large amount for the value of its services rendered the Railroad Company on a *quantum meruit*. On the trial the Court sustained an objection to the proof of the *quantum meruit* on the ground that as the contract provided for an appraisement and award by the Chief Engineer, as the only means of valuation and recovery, the plaintiffs could not sue on this contract and award and at the same time offer evidence of the value of their services distinct from and apart from the method of valuation and determination fixed by the contract.

The Court held the award of the Engineer conclusive, overruled the defense of *res adjudicata* and instructed the jury to find for the plaintiff for the full amount of its claim. On appeal this judgment was affirmed by the Supreme Court of Pennsylvania. An application was made to that Court to allow a writ of error to the Supreme Court of the United States for the determination of the effect to be given to the judgment of the Circuit Court of the United States, raising, it was claimed, a Federal question, which was refused. Application of a similar nature was then made to a Justice of the Supreme Court of the United States, and the writ was granted.

With this outline of the facts presented by the record, we submit the following

POINTS OF LAW.

1. The effect to be given a Federal judgment in any subsequent proceeding in a State Court, where such judgment is pleaded, raises a Federal question that is reviewable in the Supreme Court of the United States.

In *Pittsburgh R. R. Co. vs. Loan & Trust Co.*, 172 U. S. 493, Mr. Justice Harlan says:

> "According to these decisions and in view of the statute giving this Court authority to re-examine the final judgment of the highest Court of a State denying a right set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the Circuit Courts of the United States under which the plaintiff in error claims title to the lands and property in question."

In the case of *Deposit Bank vs. Frankfort*, 191 U. S. 499, Mr. Justice Day thus states the rule at p. 514:

> "It is true that for some purposes and within certain limits it is only required that the judgments of the Courts of the United States shall be given the same force and effect as are given the judgments of the Courts of the States wherein they are rendered; but it is equally true that whether a Federal judgment has been given due force and effect in the State Court is a question reviewable by this Court, which will determine for itself whether such judgment has been given due weight or otherwise."

It would seem clear from these authorities that the question whether due force and effect has been given to a Federal judgment, which is the question presented on the present record, is a question reviewable in the Supreme Court of the United States.

2. *The judgment of a Court of record in Pennsylvania being conclusive upon the parties, and not open to collateral attack or enquiry, the effect necessarily to be given by the Court of Pennsylvania to the judgment of the Circuit Court*

of the United States, is that of a judgment which is as a plea a bar and as evidence conclusive in any further litigation between the parties.

It will be conceded that the State Courts are bound to give to the judgment of the United States Courts, even where jurisdiction attaches solely on the ground of citizenship, the same force and effect that they give to the judgments of their own Courts of record.

Hancock National Bank vs. Farnum, 176 U. S., 640.

Deposit Bank vs. Frankfort, supra.

In Pennsylvania, the rule of the Duchess of Kingston's case is in full force. The judgments of Courts of record of that State are not open to collateral attack or enquiry. We do not understand that this proposition is questioned. If authority is needed, we quote the following expression of the Supreme Court of Pennsylvania in the case of

Stevens vs. Hughes, 31 Pa. St. Rep., at p. 384:

> "The established rule of law, that a fact which has once been directly decided shall not again be disputed between the same parties is not denied. In the Duchess of Kingston's case, so often quoted, the unanimous opinion of the Judges was that 'the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court.' Privies are equally bound."

It would seem clear, then, that the Courts of Pennsylvania are bound to give to the judgments of the Circuit

Court of the United States all the effect which, under the Duchess of Kingston's case, is given at common law to the judgments of a Court of record.

3. *Full force and effect was not given in the case at bar to the judgment of the Circuit Court of the United States for the reason that the contract, which was the basis of the suit in the Federal Court and by it declared void, was held valid and binding in the later suit in the State Court. The Contract in the suit was the same as that sued on in the Federal Court, the parties the same, and the judgment of the State Court was a direct reversal of the judgment of the Federal Court.*

That the contract sued on was the same in both cases will not be disputed. The record shows this to be the fact. That the parties were the same, does not appear to be seriously disputed. It could hardly be seriously contended that a plaintiff having sued the guarantor of a contract, and having been defeated by an adjudication that the contract itself was illegal and therefore void, could revitalize the contract and make it the subject of another suit in another Court by charging that the guarantor was really the principal. In such a case full effect would not have been given to the judgment of the Court which first obtained jurisdiction, and which struck the contract down as illegal. This point is conceded in the opinion of the Common Pleas and of the Supreme Court.

Judge Swearingen, who delivered the opinion of Common Pleas No. 4 (record, p. 69), says:

> "In considering the effect of the judgment of the United States Court, we disregard the form in which that action was brought and the facts that more parties

than the defendant were sued and that the action was apparently one against guarantors. We assume for the purposes of this consideration, that said action was between the same parties, and upon the same cause as this one. Does then the act of May 23, 1907, revitalize the contract. which the United States Court declared invalid?"

This succinctly states the real and only issue upon this phase of the case.

Justice Stewart, who delivered the opinion of the Supreme Court of Pennsylvania, (record, p. 83) says:

> "We may concede that so far as concerns the appellant here the parties were the same, and that the cause of action was the same in both suits; but it remains true nevertheless that the adjudication of the Circuit Court of the United States was not on the merits of the case."

The learned Justice thus concedes the identity of subject matter and parties, though in stating the question to be whether or not the decision of the United States Court was upon the merits he seems to us to clearly misapprehend the real issue, for if the only question were whether the judgment of the United States Court striking down a contract as illegal and therefore void was a decision on the merits, there would be but little need of argument. The real question, we submit, is that stated by Judge Swearingen,—did the act of 1907 revitalize and make effective the contract which was void prior to that act and when sued on in the Federal Court? Before coming to the discussion of that branch of the case, however, it is necessary to consider briefly certain minor reasons which the defendant in error sets up as showing that the former judgment has not been impaired.

(a) The defendant in error asserts that the present judgment does not impair the validity of the Federal judgment, because in rendering their judgments the Federal Courts expressly reserved to the Pittsburgh Construction Company the right to bring a suit for services performed. That is true. The Circuit Court of the United States held the contract void, and the award founded on that contract void, for the reason that the plaintiff was not registered in Pennsylvania when the contract was made but pointed out that as the 'plaintiff was registered before it began its actual word of construction, it could maintain an action of *quantum meruit* independent of the contract and recover in this form of action for practically everything it had done. But the plaintiff did not want to sue on a *quantum meruit.* The record in this case, so far as printed, and the opinions of the different Courts, show that the Railroad Company and its Receivers had many and grave reasons to urge why the award of the Engineer should not be allowed to stand. They claimed and earnestly contended that it was excessive, unjust, and the arbitrator had never even considered their claim of set off. It is obvious, then, that the recovery on the contract and award, and the recovery on the *quantum meruit* are two entirely different things.

The defendant in error has never sued solely for its services performed, but has hung tenaciously to its contract and award. The Railroad and its Receivers have never objected that the defendant in error could not sue on a quantum meruit for services performed, but have always fought as strenuously as they could against the allowance of the award. It is true the defendant in error joined a count up on a *quantum meruit* to its claim upon the contract in the present case. But as the contract, if valid, gave the sole method of valuation and recovery through an appraisement and

award, it was quite manifest that the plaintiff could not use these inconsistent grounds of action in one suit.

The situation is exactly as though the Federal Court had said to the defendant in error, then plaintiff in the action before that court, "The contract you have sued on is illegal and void, the award of the arbitrator made under that contract is of course void in consequence, but aside from the contract you may sue on a *quantum meruit* and receive such amount as you may satisfy a jury your services performed, after you became duly registered in Pennsylvania, are fairly worth." Instead of following the course thus pointed out, the Construction Company sues in the State Courts on the same contract, uses the same award, and then says it can do this because the Federal Court gave it the right to sue for the value of its services. It seems to us too clear to need extended argument that when it takes this course, it has not done the thing the Federal Court said it might do, but, on the other hand, has done exactly the thing that the Federal Court said it might not do.

(b) The defendant in error assigns as another reason for dismissing this writ that the judgment of the Circuit Court of the United States was not upon the merits. In the preceding paragraph we have already considered substantially the same question under the proposition that because the judgment of the Federal Court allowed a further proceeding to determine the value of the services performed by the defendant in error, the adjudication of the contract was not a judgment on the merits of the case. A word may be added generally upon the subject.

We understand a disposition of a case upon its merits arises where the cause of action is determined finally as either good or bad. Where the case goes off on some collat-

eral matter, such as that the cause of action is not yet due, or the proper parties have not been joined, or there is a defect in the pleadings, or some other matter which leaves the real cause of action untouched and undetermined, this is not such judgment on the merits as will prevent another action.

The rule is well stated in the case cited by the Supreme Court of Pennsylvania in its opinion in the present case (record p. 85). That was the case of

Roney vs. Westlake, 216 Pa. St., 374.

That was the case where a suit was brought upon a note which had not been stamped as required by the United States Revenue Act. A judgment was rendered for the defendant. Subsequently a new suit was brought upon the same instrument, a revenue stamp having been, in the meantime, duly affixed and cancelled. It was there held that the first judgment was a bar to the second suit. Justice Mestrezat, who delivered the opinion of the Court, thus defines the class of cases where a judgment is not conclusive:

> The case in hand must be distinguished from that class of cases where the judgment set up in bar of the second action is not upon the merits of the question involved in litigation. These cases are where the judgment is founded upon a lack of jurisdiction, a non joinder or misjoinder of parties, plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleadings or the like; 24 Am. & Eng. Encyc. of Law, 2d Ed. 794; or where the suit is discontinued, the plaintiff becomes nonsuit, the debt is not yet due, or there is a temporary disability of the plaintiff to use: I Greenleaf on Evidence, Secs. 529, 530; *Weigley vs. Coffman,* 144 Pa., 489. Judgments in those cases are not a bar to another action."

Clearly the case at bar does not fall within any of these exceptions. In these and any similar cases, the contract or cause of action was never before the Court for its disposition. In the case at bar, however, the very contract itself was before the Court and declared to be void. Judge Buffington in his opinion (Record, p. 58) quotes the language of *Coppell vs. Hare*, 7 Wallace, 558: "Whenever the illegality appears, whether the disclosure appears from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys."

Judge Holland, in rendering the opinion of the Circuit Court of Appeals (Record, p. 63) says:

> "The suit here is against the sureties of the contractor, and the alleged contract the basis of the action. As the plaintiff must rely upon its void contract to recover, the action must fall."

It is, therefore, perfectly apparent that the contract itself was before the Court and pronounced void, because arising out of a set of illegal transactions. We are unable to conceive a more radical disposition of a cause upon its merits. If the parties had not executed the contract, or it had been mutilated after execution, or the statute of limitations had run, no more complete and final disposition of the very subject matter of the case would arise than we have upon the present record.

(c) The final question to be considered is whether the Act of May 23d, 1907, revitalizes the contract which the United States Court had declared invalid, so that it might furnish the basis of a new cause of action.

It is true that this position is not developed in the argument of the learned counsel for the defendant in error in their motion to dismiss this case. They apparently pivot their position on the fact that the Supreme Court of Pennsylvania undertook to give the judgment of the United States Court the same effect as they would have given a judgment of their State Court, and that having reached a conclusion in support of which they cite not only Pennnsylvania decisions but those of other States and the United States, that the Federal judgment was not upon the merits and therefore not conclusive, this conclusion cannot be enquired into, but must be accepted as final. We have already cited the authorities to show that this is not the rule. The State Courts determine what character and effect is to be given to their judgments generally. It is for those Courts to indicate to what class their judgments belong, whether they are conclusive or open to collateral attack. When once they have defined their character and effect, the question whether or not in a particular case the described effect has been given to the judgment of a Court of the United States, is a Federal question and as such will be considered by the Supreme Court of the United States independently of the conclusion reached by the State Supreme Court.

Deposit Bank vs. Frankfort (supra).

It is obvious that any other conclusion would entirely destroy any protection which the Courts of the United States could give to their own judgments and decrees.

The opinion of Judge Swearingen of the Common Pleas Court, however, puts the case squarely upon the position that the act of May 23d, 1907, practically created a new and valid cause of action which had never been passed upon by the United States Court, and consequently could be recovered upon without any disturbance of a Federal judg-

ment. Record, p. 69. This, it appears to us, is the real question in the case. We submit that all minds will agree that had the Act of May 23d, 1907, not been passed, no fresh suit would have been brought upon the contract which had been declared invalid by the United States Circuit Court, and had such suit been brought no Court would have considered it for a moment. The suggestions that the decision of the United States Court was not on the merits, or that the reservation to the plaintiff in that judgment of the right to sue on a *quantum meruit*, gave it the right to sue again upon the discredited contract, seem to us only to tend to becloud the issue and draw the mind into fanciful discussions.

The effect to be given to the Act of 1907 in its relation to the contract which had already been adjudged void by the United States Court, raises an interesting question and one on which the authorities do not appear to be in entire accord.

The earlier Pennsylvania and Federal cases seem to go to quite an extent in holding that any legislation which is passed in aid of a contractual obligation, no matter in what way that obligation arose, nor what was the character of the defense to it, is not in violation of the provisions of the Constitution of the United States, prohibiting the enactment of laws impairing the obligation of contracts or *ex post facto* in character, and is therefore valid.

Several cases are cited by Judge Swearingen to this effect (Record, p. 69). The only comparatively recent case he cites is

Donley vs. Pittsburgh, 147 Pa. St., 348.

As this was a case, however, of curative legislation for a municipal corporation, and as such corporations have always

been held peculiarly and distinctively appropriate subjects for legislation of this character, we may lay it aside from the present discussion. Of the remaining cases he cites, we may select for consideration the case of

Satterlee vs. Matthewson, 16 S. & R., 169,

because it is the most recent of its class, because it goes to greater extremes than any other, and because it subsequently came before the Supreme Court of the United States and was affirmed in 2 Peters, 380.

In that case two persons held land in common, in Pennsylvania, under a Connecticut title. They partitioned the land and one of them leased from the other the portion of the land that other had received in severalty. Subsequently the tenant obtained title to the land under lease, from the State of Pennsylvania, and defended in an ejectment brought against him by his landlord on this new title. The Common Pleas Court held that the tenant could not set up title against his landlord, and gave judgment for the plaintiff. This judgment was reversed by the Supreme Court of Pennsylvania for the reason that the relation of landlord and tenant could not exist between persons holding under Connecticut titles. Immediately after this decision the Legislature of Pennsylvania enacted "That the relation of landlord and tenant should exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth." On the retrial of the case the Court below charged the jury in accordance with this Act of Assembly, and verdict and judgment were again rendered for the plaintiff, the landlord. This judgment was affirmed, on writ of error by the Supreme Court of Pennsylvania, and a writ of error being taken from this judgment to the Supreme Court of the United States, the judgment was affirmed.

The opinion of the majority of the Court was delivered by Mr. Justice Washington. Referring to the decision of the Supreme Court of Pennsylvania holding that the relation of tenancy did not exist among Connecticut settlers, he says (p. 414):

> "And, admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract and to destroy or impair one mean the same thing."

The doctrine of the legislative control over contracts, whether adjudicated or not adjudicated, is here stated about as broadly as it can be put. It makes no difference that the contract is void, or has been declared void, or indeed that there is no contract at all, the legislature in validating or creating such a contract does nothing unconstitutional because it has not in any way impaired the validity of a contract.

Mr. Justice Johnson, who filed the dissenting opinion in this case, has this to say of the proposition thus laid down (p. 414):

> "I assent to the decision entered in this cause, but feel it my duty to record my disapprobation of the ground on which it is placed. Could I have brought

myself to entertain the same view of the decision of the Supreme Court of Pennsylvania, with that which my brethren have expressed, I should have felt it a solemn duty to reverse the decision of that Court, as violating the constitution of the United States in a most vital part. What boots it that I am protected by that constitution from having the obligation of my contracts violated, if the legislative power can create a contract for me, or render binding upon me a contract which was null and void in its creation. To give efficacy to a void contract, is not, it is true, violating a contract, but it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts which bear upon individual rights and liabilities, and against the whole of which the constitution most clearly intended to interpose a protection commensurate with the evil."

Again on p. 416, after explaining that the decision of the Supreme Court of Pennsylvania could be sustained apart from the Act of Assembly, he proceeds:

"The decision of the State Court is supported under this view of the subject, without resorting to the portentous doctrine (for I must call it portentous) that a State may declare a void deed to be a valid deed, as affecting individual litigants on a point of right, without violating the Constitution of the United States. If so, why not create a deed or destroy the operation of a limitation act after it has vested a title.

The whole of this difficulty arises out of that unhappy idea that the phrase *'ex post facto'* in the Constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the doctrine."

Thus the controversy was left something more than eighty years ago. While it has not come again in direct form before the Supreme Court, yet so far as we can judge by the trend of judicial decision and the discussion of text writers, the view expressed by Mr. Justice Johnson has been the prevailing one, and the view has strengthened that a man has a vested right in his title, in his freedom from obligation which he has not legally entered into, in his defense adjudged in his favor.

In *United States vs. Leffler*, 11 Peters, 86, the Court says (at p. 101):

> "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

In *Ewell vs. Daggs*, 108 U. S. p. 151, Mr. Justice Matthews says:

> "That the right of a defendant to avoid his contract is given to him by the statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, *as long as it remains in fieri, and not realized by having passed into a completed transaction*, may, by a subsequent statute, be taken away."

Gross vs. U. S. Mortgage Co., 108 U. S. at pp. 488, 489, cites *Satterlee vs. Matthewson* (supra) but not to the extreme position taken in that case, and further cites the opinion of Mr. Justice Matthews in *Ewell vs. Daggs*, *supra*.

In *Erskine vs. Steele Co.*, 87 Fed. Rep. p. 630 (affirmed 98 Fed. Rep. 215) Judge Amidon, in his opinion at p. 634, says:

> "*The obligations of private parties must be determined by the law in force at the time of the transactions out of which they accrue.* But, as we have already seen, this principle does not apply in case of *public corporations*, so as to preclude the passage of curative acts." (our italics)

In *Crescent City Live Stock Co. vs. Butchers Union Slaughter House Co.*, 120 U. S. 141, Mr. Justice Matthews, speaking of the effect of a judgment of the United States Court, said:

> "Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every form where it is legitimately produced as the foundation of an action, *or of a defense*, either by plea or in proof, as it would be in any other circumstances." (The italics are ours).

The principle is thus stated in

Cooley's Constitutional Limitations, p. 528:

> "So he who was never bound either legally or equitably cannot have a demand created against him by mere legislative action."

Sutherland on Statutory Construction, Sec. 480, says:

> "A law can be repealed by the law giver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it had produced. This is a principle of general jurisprudence, but a right to be within its protection

must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of existing law. It must have become a title legal or equitable to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

Again at Sec. 480, the author says:

"There is a vested right in an accrued cause of action; in a defense to a cause of action; even in the statute of limitations when the bar has attached, by which an action for a debt is barred."

These text citations are referred to in a recent opinion of the Supreme Court of Pennsylvania in the case of

Lewis vs. P. R. R., 220 Pa. St. 317.

That was the case of an action by the wife of a Pullman Car conductor against the Pennsylvania Railroad for the death of her husband in the Harrisburg wreck. At the time of the accident by virtue of the act of April 4, 1868, persons employed on or about a Railroad Company's property were to be regarded as employees of the Railroad. After suit brought, but before verdict, this act was repealed by the Act of June 10, 1907. It was argued on the part of the plaintiff, that the repeal of the act of 1868, before verdict, left the case as though that act had never been passed. This contention was negatived by the Supreme Court, that Court holding such legislation could not act retrospectively, and that "A legal exemption from a demand made by another, is a vested right which the legislature may not interfere with." The opinion is by Mr. Justice Stewart, who wrote the opinion in the case at bar. It would seem as though the strong views the Justice takes in regard to the vested right

to the defense to an action is responsible for his basing the opinion in our case upon the proposition that the decision of the Circuit Court was not a judgment upon the merits. In the case cited he says (at p. 323):

> "A statute which assumes to give character to facts which they do not possess at the time they took place, and attaches to them legal consequences from which they were exempt antecedent to the time of its passage, is in its essential nature *ex post facto*, and all such laws are considered as founded on unconstitutional principles, and, therefore, inoperative and void. In a general literal sense, an *ex post facto* law is one passed in regard to an act after the act is done; but in its most comprehensive definition it includes all retrospective laws or laws governing or controlling past transactions, whether they are of a civil or criminal nature: *Potter's Dwarris on Statutes*, page 167."

Again on page 324, after calling attention to the fact that a cause of action once complete gives a vested right to the claimant which cannot be taken from him, he proceeds:

> "A legal exemption from liability on a particular demand, constituting a complete defense to an action brought, stands on quite as high ground as a right of action. If the law of the case at the time when it became complete is such an inherent element in it, that a plaintiff may claim it as a vested right, on what possible ground can it be held that a defendant has no vested right with respect to an exemption or defense? The authorities make no distinction between them."

We submit that the rule to be extracted from these authorities is, that while a prohibition of contracting power which is imposed by the legislature solely in the interests

of the public, may, in like manner, be removed by the legislature and the contract validated so long as it remains *in fieri,* yet when action has been brought on the contract, the statutory prohibition has been pleaded and final judgment has passed in favor of the defendant upon this ground, it is then too late for the legislature to remove the statutory bar and revitalize the contract, for the contract no longer has a separate existence but is merged in the judgment—*transit in rem judicatum*—and the successful party has a vested right in the judgment in his favor which is beyond legislative control.

(d) The contention of the defendant in error goes beyond the most extreme of the cases above cited for the reason that the effect of the legislation, under which the defendant in error claims the right to proceed, is really and in effect a direct reversal of the judgment of the Federal Court.

The reasoning in support of the motion of the defendant in error proceeds upon the assumption that at one time the legislature of Pennsylvania had enacted in substance "That all contracts made by non-registered foreign corporations shall be void," and that subsequently after such a contract had been declared void by the Courts in accordance with the legislative mandate, the same legislature had passed a curative act in which they said in substance, "All such contracts heretofore made shall be valid."

But this is not the form that the matter took. The Act of 1874, cited above, did not declare any contracts void or voidable. It simply made it illegal for a foreign corporation, without attending to certain matters which for brevity we call "registration" "to do any business in this Commonwealth," and the third paragraph of the Act made the doing of such business by any agent, officer or employe of

such corporation a misdemeanor to be punished by fine or imprisonment. The illegality of the contract sought to be made was an inference or deduction by the Courts from the illegality of the actions out of which it arose. The reasoning of the Courts on this subject is well illustrated by the following citation from the opinion in

McMullen vs. Hoffman, 174 U. S., 654:

> "The authorities from the earliest time to the present unanimously hold that no Court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action Courts will not enforce it, nor will they enforce any alleged rights directly springing from such contracts."

Now the curative Act of 1907, which is under consideration, does not change in the slightest degree the facts upon which the opinion of the Federal Court was reached. It does not permit the foreign corporations it described to do business in Pennsylvania, nor does it declare legal the business they have done. It does not relieve the officers and employes of such corporation from the guilt of a misdemeanor- either as to past or present transactions; they are each and all still subject to indictment for anything they may have done contrary to the original act. It simply sets aside the conclusion the Courts have reached. without in any manner changing the facts upon which that conclusion rests. The Court said that, following the precedents from the earliest times, it would not give effect to a contract which had its origin in forbidden or criminal acts. The Legislature said that, without changing at all the facts of the case, the contract should be good. It is not apparent that the Legislature in so doing has undertaken to discharge the functions of the judiciary?

That the Legislature shall determine the public policy of the State goes without saying; but that it should impose arbitrary and different results to a series of judicial conclusions is, we submit, going further than the Courts have yet gone.

Is it not also perfectly apparent that the Legislature cannot alter, it has no power to alter, the character of the acts of the parties at the time this contract was entered into? The purpose of the contract, at the time it was entered into was to *do unlawful acts*, bind the corporation to the doing of unlawful acts, and to procure the further doing of unlawful acts (opinion of Judge Buffington, record, p. 57). Now no subsequent act or declaration of the Legislature can change or alter the purpose and intent of the parties as the law stood at the time the contract was entered into. No subsequent law can say that the purpose to do an act was not unlawful, if the act was unlawful at the time the purpose to do it was formed. The Legislature, in total disregard of the premises upon which the Court declared the contract illegal, by its *brutum fulmen*, declares the contract legal. We submit that if the Legislature can do this they can, in like manner, deal directly and openly with the judgment of the Federal Court in this case, and declare, without more, that that judgment shall be reversed, and the contract decided by the Court in that case to be void shall be good and susceptible of further action in the State Court. To concede this power to the Legislature is to give to it a greater control over the judgments of the Federal Courts than is given to the highest Appellate Courts of any State.

4. In all of the foregoing argument we have treated the Act of 1907 as if passed subsequent to the decision of the Circuit Court of Appeals. As a matter of fact, however, the act antedated the decision by about two months, the

act having been approved on May 23rd, 1907, to take effect immediately, and the decision of the Circuit Court of Appeals being handed down on July 18th, 1907. In other words, *the act upon which the defendant in error now relies was in effect at the time of the decision. It must necessarily have been considered* by the Circuit Court of Appeals, and its effect upon the pending controversy determined.

It is fundamental law that an appellate court must and does decide cases which are pending before it in accordance with the existing laws, even though the law may not have been passed until after the judgment in the lower court was rendered. And it matters not that to give effect to the new law the appellate court must set aside a judgment rightful when entered.

Chief Justice Marshall, in the case of *United States vs. Schooner Peggy*, 1 Cranch, 103, unequivocally announced this doctrine in the following words:

> "It is in the general truth that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its mani-

fest import; and if the nation has given up the vested rights of its citizens, it is not for the court but for the government to onsider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful, when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

This decision has been followed by this court in *Dinsmore vs. Southern Express Company et al.*, 183 U. S., 115, where, on page 120, Mr. Justice Harlan, in delivering the opinion of the court, said:

"Although this cause was determined in the Circuit Court of Appeals and was submitted here prior to July 1, 1901, our judgment must have some reference to the act of 1901. In *United States vs. Schooner Peggy*, 1 Cranch, 103, 109, the Chief Justice, delivering the opinion of the court, said: 'It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.' *Mills vs. Green*, 159 U. S., 651; *New Orleans Flour Inspector vs. Glover*, 160 U. S., 170; *Same vs. Same*, 161 U. S., 101.

If the cause had not been submitted in the Circuit Court of Appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disap-

peared and that the order of the Railroad Commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the Railroad Commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898."

The same rule has been applied in many state courts, some of these decisions being as follows:

Day vs. Day, 22 Maryland, 530; *Simpson vs. Stoddard Co.,* 173 Mo., 423; *Pelt vs. Payne et al.,* 30 Southwest Rep., 426; *Sidway vs. Lawson,* 58 Ark., 117.

It is clear, then, that the question of the effect of the Act of 1907 was before the Circuit Court of Appeals, the act having been passed before its decision was handed down. Since the Court of Appeals has given no effect to this act, it has decided that the Act of 1907 does not have the effect claimed for it by the defendant in error, to wit, the creating in the defendant in error of a new cause of action.

In conclusion, we submit that if in any case the parties have a vested right in their judgment, it is in this case. The contract was made in 1901. At May Term, 1906, the Construction Company brought its action in the United States Circuit Court, upon this contract against the Railroad Company as a guarantor. The judgment of the Court is that the contract is void. In May, 1907, the curative act declaring the contract legal was approved. On July 18th, 1907, the Circuit Court of Appeals affirmed the judgment of the Circuit Court. In August, 1907,

the Construction Company, in the Common Pleas Court No. 4 of Allegheny County, sued the Railroad Company as the real contractor upon the same contract. In the summer of 1909, that Court gives judgment for the plaintiff. In January, 1910, the Supreme Court of Pennsylvania affirms that judgment. The resolution of 1843, under which the original contractor has a lien in the nature of a Mechanics' lien against a railroad company for work done in its construction, has already been referred to. The effect of it all, then, is that long after the decision of the Federal Court striking down this contract, we find the contract revived, put in action and sustained in such form as to make possible the entry of a Mechanics' lien for the amount claimed to be due under it, against the Railroad Company and its Receivers, and at some place back along the line of debts, securities and certificates, the wedge of this lien may be driven in.

We submit that the questions presented on this record are not frivolous. We have no wish to delay the disposition of the case, we are perfectly willing that its hearing be accelerated. To what extent the judgments of the United States are subject to be set aside by legislation of the State in which they are rendered, strikes us as an important question.

THOMAS PATTERSON,
Counsel for Plaintiff in Error.

AN ACT

To prohibit foreign corporations from doing business in Pennsylvania, without having known places of business and authorized agents.

Section 1. BE IT ENACTED, etc., That from and after the passage of this act, no foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

Section 2. It shall not be lawful for any such corporation to do any business in this commonwealth until it shall have filed in the office of the secretary of the commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices.

Section 3. Any person or persons, agent, officer or employee of any such foreign corporation, who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same.

Approved—The 22nd day of April, A. D. 1874.

P. L. 108. J. F. HARTRANFT.